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Rethinking Discrimination Law

Sandra F. Sperino
University of Cincinnati College of Law, sandra.sperino@uc.edu

RETHINKING DISCRIMINATION LAW

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Modern employment discrimination law is defined by an increasingly complex set of frameworks. These frameworks structure the ways that courts, juries, and litigants think about discrimination. This Article challenges whether courts should use the frameworks to conceptualize discrimination. It argues that just as faulty sorting contributes to stereotyping and societal discrimination, courts are using faulty structures to substantively limit discrimination claims.

This Article makes three central contributions. First, it demonstrates how discrimination analysis has been reduced to a rote sorting process. It recognizes and makes explicit courts' methodology so that the structure of discrimination analysis and its effects can be examined. Second, it demonstrates how the frameworks tend to squeeze out claims that are arguably cognizable under the federal discrimination statutes' broad operative language. This Article's final contribution is to propose a simpler model for thinking about employment discrimination law. It argues for a return to first principles that would require courts to specifically define key statutory language.

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INTRODUCTION

In the 1970s, federal courts began identifying categories of discrimination, such as disparate impact, disparate treatment, and harassment. They then created elaborate, multipart rubrics tied to each category.[1] Modern employment discrimination law is defined by these frameworks. They serve as gatekeepers that control the substantive discrimination narratives that juries hear and also structure the ways that judges and lawyers think about discrimination.

Legal scholarship is replete with excellent articles challenging the specific frameworks that courts use to evaluate discrimination claims.[2] This Article does not challenge any particular framework. Instead, it challenges whether courts should even use frameworks to conceptualize discrimination in the first place. Just as faulty sorting contributes to stereotyping and societal discrimination, courts are using faulty structures to substantively limit discrimination claims.

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1. This Article uses the term "framework" to refer to the two-step process that courts use to funnel discrimination claims, in which courts label the category of discrimination and then apply the appropriate rubric. This term is used to avoid the confusion that might otherwise be created by using terms such as "claim" or "elements," which have more specific meanings in civil procedure. As explained in more detail in Section IV.B, there is rampant procedural confusion regarding whether the discrimination categories represent separate claims and whether the rubrics are elements of those claims.

2. *See, e.g.*, William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683 (2010); William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009); Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857 (2010) [hereinafter Katz, Gross *Disunity*]; Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995); Natasha T. Martin, *Pretext in* Peril, 75 Mo. L. REV. 313 (2010); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911 (2005); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887 (2004); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001).

The Article makes three central contributions. First, it demonstrates how discrimination analysis has been reduced to a rote sorting process. It recognizes and makes explicit courts' methodology so that the structure of discrimination analysis and its effects can be examined.

Second, it demonstrates how these frameworks tend to squeeze out claims that are arguably cognizable under the federal discrimination statutes' broad operative language. This happens because the categories and rubrics that comprise the frameworks are overly influenced by the facts and theories of the specific cases through which they were developed and are resistant to change. Additionally, courts tend to treat the typology of frameworks as representing a complete lens through which to view discrimination and fail to consider the frameworks as part of a unified whole. This reasoning produces a factually and theoretically narrow view of employment discrimination law driven by path dependence.

Litigating by typology results in a gap between what is cognizable under the frameworks and what is arguably cognizable under the federal discrimination statutes' operative provisions. Thus, the key question in modern discrimination cases is often whether the plaintiff can cram his or her facts into a recognized structure and not whether the facts establish discrimination. This Article argues that path-dependent reasoning has allowed courts to implicitly reject new theories of discrimination, without actually analyzing whether such theories are viable. Path-dependent reasoning also causes courts to dismiss claims that straddle more than one framework or that do not fit neatly within recognized structures. The typology has led to doctrinal, procedural, and theoretical confusion within employment discrimination law and has mired the field in endless questions about frameworks rather than in addressing the field's core issues.

These frameworks have effects outside the courtroom. More than forty years after the passage of Title VII, workers continue to experience discrimination.[3] When workers describe this discrimination, though, they often report incidents that would not be legally cognizable under current frameworks but that are arguably discriminatory within the statutory language.[4] When employers define and measure discrimination in a workplace, they are likely to do so against the yardstick set by the recognized frameworks.

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3. *See, e.g.*, *Title VII of the Civil Rights Act of 1964 Charges*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited May 8, 2011) (noting 68,710 charges of discrimination filed in fiscal year 2009, compared with 58,615 in fiscal year 1997); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 182–83 (2008) (describing research regarding perceptions of discrimination).

4. *See, e.g.*, CATALYST, BIT BY BIT: CATALYST'S GUIDE TO ADVANCING WOMEN IN HIGH TECH COMPANIES 8 (2003), *available at* http://www.catalyst.org/file/7/bit (reporting that women indicated their underrepresentation in high-tech companies was due to exclusionary corporate cultures and they felt a sense of isolation resulting from a lack of role models, networks, and mentors); NETWORK OF EXEC. WOMEN, WOMEN OF COLOR: THE CHALLENGE AND OPPORTUNITY AHEAD (2006), *available at* http://www.newnewsletter.org/bestpractices/newreport2_woc0407.pdf (indicating that women of color feel doubly isolated, lack mentors, and are discouraged from seeking promotions because they witness the lack of advancement of others).

Because this legal yardstick does not measure the full extent of potentially cognizable discrimination, however, it is a poor metric for evaluating whether discrimination occurs.

The Article's final contribution is to propose a simpler model for thinking about employment discrimination law. It argues for a return to first principles that would require courts to specifically define key statutory language.

The Article is organized in the following manner. Part I describes how courts developed the frameworks for evaluating discrimination claims and shows how the frameworks remain unresponsive to changes in the workplace and discrimination theory. Part II provides examples of how the frameworks distort discrimination inquiries, and Part III explores why the frameworks cause courts to ignore potentially cognizable claims. Part IV considers other serious consequences that result from relying on the frameworks. Finally, Part V proposes a way to think about discrimination law without dependence on the frameworks.

I. THE DEVELOPMENT OF THE DISCRIMINATION FRAMEWORKS

The history of employment discrimination law could be described as a history of frameworks. In an almost predictable pattern, the Supreme Court has recognized a category of employment discrimination, and then—either in the same case or sometime thereafter—created a multipart test for evaluating it. For some frameworks, decades of unrest then follow as lower courts struggle with either the rubric itself or with integrating the rubric into other parts of employment discrimination law. The Supreme Court often has—and Congress occasionally has—stepped in to "fix" the framework.

This pattern did not always exist. In the 1960s, the bulk of employment discrimination claims alleged that employers (or unions) had adopted explicit policies regarding hiring, termination, or promotion based on a person's race or gender.[5] Courts evaluated such claims in a fairly straight-

5. *See, e.g.*, Vogler v. McCarty, Inc., 294 F. Supp. 368, 374 (E.D. La. 1968) (alleging that employer engaged in discrimination by hiring only union members, when union itself engaged in discriminatory membership practices), *aff'd sub nom.* Vogler v. Local 53 of the Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, 407 F.2d 1047 (5th Cir. 1969); Weeks v. S. Bell Tel. & Tel. Co., 277 F. Supp. 117, 117–18 (S.D. Ga. 1967) (alleging that employer had a policy of making gender a qualification for a switchman position), *aff'd in part, rev'd in part*, 408 F.2d 228 (5th Cir. 1969); Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 781 (E.D. La. 1967) (alleging discrimination based on company policy that required women to resign upon marriage); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 336 (S.D. Ind. 1967) (alleging that company's use of male and female layoff lists was discriminatory), *aff'd in part, rev'd in part*, 416 F.2d 711 (7th Cir. 1969); Evenson v. Nw. Airlines, Inc., 268 F. Supp. 29, 30 (E.D. Va. 1967) (alleging discrimination based on company policy that required women to resign upon marriage); Int'l Chem. Workers Union v. Planters Mfg. Co., 259 F. Supp. 365, 366 n.1 (N.D. Miss. 1966) (alleging that company did not include "Negro employees in the top operating classifications" and that it maintained discriminatory wage rates and discriminated in overtime pay and allowance of vacation time); United States v. Bldg. & Constr. Trades Council, 271 F. Supp. 447, 450 (E.D. Mo. 1966) (alleging that unions had policy discriminating against people based on race); Glover v. St. Louis–S.F. R.R. Co., No. CA 65-

forward way: they required the plaintiff to establish that her employer took the alleged action because of a protected trait.[6] As courts began to divide discrimination law into categories, however, this broader approach to employment discrimination changed.[7]

This Part describes the development of the current employment discrimination typology from two perspectives. The first Section maps the discrimination model as it developed, largely through Supreme Court precedent. The second Section juxtaposes the development of the model with changes in the workplace and evolving understandings about how discrimination occurs.

While reading this history, it is important to remember that each of the discrimination frameworks was originally developed in the context of Title VII and was, in theory, supposed to support Title VII's primary operative language, which provides as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[8]

Although not identical, the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA") have similarly broad operative language.[9]

477, 1966 WL 68, at *1 (N.D. Ala. July 13, 1966) (alleging that employer and union maintained a discriminatory seniority roster), *aff'd sub nom.* Glover v. St. Louis–S.F. Ry. Co., 386 F.2d 452 (5th Cir. 1967), *rev'd*, 393 U.S. 324 (1969); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 188 (M.D. Tenn. 1966) (alleging that employer maintained a segregated job structure).

6. *See, e.g.*, Washington v. Safeway Corp., 467 F.2d 945, 948 n.6 (10th Cir. 1972) (indicating that the plaintiff had not shown that he had been discriminated against in the terms and conditions of his employment on the basis of his race); Green v. McDonnell-Douglas Corp., 318 F. Supp. 846, 850 (E.D. Mo. 1970) (noting that the issue before the court was whether employer's refusal to rehire was based on racial prejudice), *rev'd on other grounds*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973).

7. A plaintiff may also allege retaliation, failure to accommodate (religion and disability), or that the employer engaged in a pattern or practice of discrimination. Each of these also has separate proof structures. *See, e.g.*, US Airways, Inc. v. Barnett, 535 U.S. 391, 400–401 (2002) (providing framework for disability accommodation); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (providing basic framework for pattern or practice claims); Reed v. UAW, 569 F.3d 576, 579–80 (6th Cir. 2009) (discussing religious accommodation framework).

8. Title VII § 703, 42 U.S.C. § 2000e-2(a) (2006).

9. The ADEA makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his

A. *The Legal History of the Discrimination Frameworks*

The legal history of the employment discrimination frameworks can be shown through the development of the disparate impact, individual disparate treatment, and harassment doctrines. In 1971, the Supreme Court interpreted Title VII to allow plaintiffs to assert discrimination based on disparate impact,[10] reasoning that Title VII prohibited not only intentional conduct, but policies and practices that created "built-in headwinds" to the hiring of black employees.[11] Thus, the Court in *Griggs v. Duke Power Co.* articulated a reason for recognizing a category of discrimination called "disparate impact" and began to develop a rudimentary structure for evaluating it.[12] The Court indicated that the defendant company's testing and high school diploma requirements were discriminatory, for example, because they did not "bear a demonstrable relationship to successful performance of the jobs."[13]

Four years later, in *Albemarle Paper Co. v. Moody*,[14] the Court suggested that disparate impact claims would follow a three-part burden-shifting structure, similar to the test announced in *McDonnell Douglas Corp. v. Green*, and enunciated a more complete test for evaluating disparate impact cases.[15] Almost fifteen years later, the Court modified the disparate impact test in two cases, *Watson v. Fort Worth Bank & Trust*[16] and *Wards Cove Packing Co. v. Atonio*.[17] In *Watson*, the Court (in a portion of the opinion joined by a plurality) indicated that to prove a disparate impact the plaintiff needed to identify "the specific employment practice that is challenged" and needed to establish statistical evidence of a kind and degree sufficient to show that the practice disparately affected a protected class.[18] The burden of production then shifted to the defendant to show that "its employment practices are

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compensation, terms, conditions, or privileges of employment, because of such individual's age" or to "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." Age Discrimination in Employment Act § 4(a), 29 U.S.C. § 623(a) (2006). The ADA prohibits discrimination "against a qualified individual [on the basis of disability] in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Americans with Disabilities Act § 102(a), 42 U.S.C. § 12112(a) (2006). It then further defines discrimination in a separate subsection, containing seven separate definitional categories. *Id.* § 102(b), 42 U.S.C. § 12112(b).

10. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

11. *Id.* at 432 (internal quotation marks omitted).

12. *Id.* at 431.

13. *Id.*

14. 422 U.S. 405 (1975).

15. *Compare Albemarle Paper Co.*, 422 U.S. at 425, *with* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–03 (1973).

16. 487 U.S. 977 (1988) (plurality opinion), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

17. 490 U.S. 642 (1989), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

18. *Watson*, 487 U.S. at 994.

based on legitimate business reasons."[19] Once the defendant meets this burden, the plaintiff can prevail by showing that the defendant could have used other tests that would not have created the same disparity.[20] A year later, in *Wards Cove*, a five-justice majority largely reaffirmed the *Watson* plurality's interpretation of the requirements for proving disparate impact.[21]

Unhappy with this Court-created structure, Congress amended Title VII in 1991.[22] The 1991 amendments imported the concept of a "specific employment practice" from the case law, but also allowed a plaintiff to challenge combined practices that created a disparate impact if the plaintiff was unable to separate the practices.[23] Under the amendments, it is the employer's burden to establish that a practice is "job related for the position in question and consistent with business necessity;" even if the defendant establishes this affirmative defense, however, the plaintiff may prevail by proving that the employer could have adopted alternate practices that would not have resulted in a disparate impact.[24]

When Congress amended Title VII, it did not make similar changes to the ADEA or the ADA.[25] In 2005, the Supreme Court held that plaintiffs could bring disparate impact claims under the ADEA.[26] Unsurprisingly, the Court also began to develop a framework for evaluating ADEA disparate impact claims.[27] The first step in the analysis is the same as the analysis for Title VII claims prior to the 1991 amendments, in that the plaintiff must demonstrate that a specific practice created a disparate impact based on the protected trait. However, the second step differs in that the employer must establish that the challenged practice was based on a reasonable factor other than age.[28] The disparate impact inquiry under the ADEA now proceeds in a different manner than the analogous inquiry under Title VII. The employee may not prevail on an ADEA disparate impact claim by establishing the existence of alternative practices.[29] The Supreme Court has not yet resolved how disparate impact claims would proceed under the ADA.

The history of individual disparate treatment is even more complex than that of disparate impact, but it too is characterized by reliance on frameworks. During the 1960s, plaintiffs often claimed that employers were

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19. *Id.* at 998.

20. *Id.*

21. *Wards Cove*, 490 U.S. at 656–57.

22. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105, § 703, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k) (2006)).

23. *See id.* (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(B)).

24. *See id.* (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

25. *See* Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

26. *Id.* at 236–38 (plurality opinion).

27. *See id.* at 240–42 (majority opinion).

28. *See* Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008) (clarifying that employer's burden at the second step is one of both production and persuasion); *Smith*, 544 U.S. at 240.

29. *Smith*, 544 U.S. at 243.

making explicit race- or gender-based decisions according to company policies.[30] Courts later grouped claims of facially discriminatory policies into a type of individual disparate treatment case referred to as a "direct evidence case."[31] The courts tended to use simple formulations in evaluating direct evidence cases, essentially requiring plaintiffs to establish that a decision was taken because of a protected trait.[32]

During the 1970s, the types of discrimination cases that federal courts heard began to change. While plaintiffs still brought numerous claims against employers and unions for facially discriminatory policies,[33] plaintiffs increasingly alleged non-policy-based discrimination.[34] In *McDonnell Douglas Corp. v. Green*, the Supreme Court created a three-part burden-shifting test for analyzing individual disparate treatment cases.[35] Under *McDonnell Douglas*, a court first evaluates the prima facie case, which requires proof of the following:

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30. *See supra* note 5 and accompanying text.

31. *See, e.g.*, Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1136–37 (10th Cir. 2000) (indicating that a company policy of discrimination constitutes direct evidence). Outside of the context of facially discriminatory policies, courts have had difficulty defining direct evidence. And definitions regarding what constitutes direct evidence vary. While the definition of "direct evidence" appears to vary by circuit, direct evidence of discrimination can be described as "evidence, that, if believed, proves the existence of a fact in issue without inference or presumption. . . . [and] is composed of only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor." Rojas v. Florida, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002) (citations omitted) (quoting Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999)) (internal quotation marks omitted). One court described direct evidence as evidence that "essentially requires an admission by the employer" and explained that "such evidence is rare." Argyropoulos v. City of Alton, 539 F.3d 724, 733 (7th Cir. 2008) (quoting Benders v. Bellows & Bellows, 515 F.3d 757, 764 (7th Cir. 2008)) (internal quotation marks omitted). "A statement that can plausibly be interpreted two different ways—one discriminatory and the other benign—does not directly reflect illegal animus, and, thus, does not constitute direct evidence." Vaughn v. Epworth Villa, 537 F.3d 1147, 1154–55 (10th Cir. 2008) (quoting Hall v. U.S. Dep't of Labor, Admin. Review Bd., 476 F.3d 847, 855 (10th Cir. 2007)) (internal quotation marks omitted).

32. *See, e.g.*, Mach v. Will Cnty. Sheriff, 580 F.3d 495, 499 (7th Cir. 2009); Paz v. Wauconda Healthcare & Rehab. Ctr., L.L.C., 464 F.3d 659, 665–66 (7th Cir. 2006) (noting that under the direct method of proving discrimination, the court should not use a burden-shifting framework).

33. *See, e.g.*, Healen v. E. Airlines, Inc., No. 18097, 1973 WL 358, at *1 (N.D. Ga. Sept. 10, 1973) (alleging discriminatory policy affecting pregnant flight attendants).

34. *See, e.g.*, Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 n.* (D.N.J. 1976) ("If a supervisor is acting within the purview of his authority, the doctrine of *respondeat superior* may be employed whether he is driving a company car or victimizing a female."), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Slack v. Havens, No. 72-59-GT, 1973 WL 339, at *5 (S.D. Cal. May 15, 1973) (indicating that Title VII imputes liability for the actions of agents and that management had ratified the conduct of the supervisor), *aff'd*, 522 F.2d 1091 (9th Cir. 1975); Tidwell v. Am. Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971) (holding employer liable when a supervisor terminated an individual based on race).

35. 411 U.S. 792 (1973). Some circuits will allow a plaintiff to make a case of discrimination without resorting to *McDonnell Douglas* if the plaintiff has "either direct or circumstantial evidence that supports an inference of intentional discrimination." Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 563 (7th Cir. 2009).

> (i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[36]

If the prima facie case is satisfied, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[37] If the defendant meets this requirement, the plaintiff can still prevail by demonstrating that the defendant's reason for the rejection was simply a pretext.[38]

In *McDonnell Douglas* itself, the Court noted that the facts required to prove a prima facie case will necessarily vary among cases.[39] As the lower courts began applying *McDonnell Douglas* to different factual scenarios, they began to develop different iterations of the test, following its basic three-part burden-shifting structure while substituting different language within the prima facie case.

After *McDonnell Douglas*, significant confusion surrounded *McDonnell Douglas*'s three-part burden-shifting test, including questions regarding the defendant's burden at the second step in the inquiry and the effect of a plaintiff's showing of pretext. Two subsequent cases clarified (and some would say altered) how the *McDonnell Douglas* test operates.[40] In *Texas Department of Community Affairs v. Burdine*, the Court explained that the defendant's burden at the second step in the *McDonnell Douglas* framework is a burden only of production.[41] The Court held that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[42] In *St. Mary's Honor Center v. Hicks*, the Court considered whether the factfinder's rejection of the defendant employer's asserted reason for its action mandated a finding for the plaintiff.[43] The Supreme Court held that while the factfinder's rejection of the employer's proffered reason permits the factfinder to infer discrimination, it does not compel such a finding.[44]

The *McDonnell Douglas* test's focus on the employer's nondiscriminatory reason for its action implicitly suggested that discrimination claims might only be cognizable if the plaintiff alleges that the employer acted solely because of a discriminatory reason. In the 1989 case *Price Waterhouse v. Hopkins*, the Supreme Court interpreted Title VII to allow

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36. *McDonnell Douglas*, 411 U.S. at 802.
37. *Id.*
38. *Id.* at 804.
39. *Id.* at 802 n.13.
40. *See* Malamud, *supra* note 2, at 2311.
41. 450 U.S. 248, 254–56 (1981).
42. *Burdine*, 450 U.S. at 253.
43. 509 U.S. 502, 508–09 (1993).
44. *Hicks*, 509 U.S. at 510–11.

so-called "mixed-motive" claims.[45] Once again, it produced yet another test. The Court held that a plaintiff must establish that a protected trait played a motivating factor in the employment decision.[46] The employer can avoid liability by proving an affirmative defense—that it would have made the same decision even if it had not allowed the protected trait to play a role.[47] While the justices agreed on many of the central contours of mixed motive, they did not agree on whether a plaintiff must present direct evidence of discrimination to proceed through the framework.[48]

Unhappy with the test the Court articulated for mixed-motive claims, Congress amended Title VII in 1991.[49] In doing so, Congress did not separately delineate a type of discrimination called "mixed-motive," nor did it enunciate a separate test.[50] Rather, Congress indicated that a plaintiff could prevail on a discrimination claim under Title VII by establishing that a protected trait played a motivating factor in an employment decision.[51] Congress also created an affirmative defense, which, if proven, would be a partial defense to damages.[52] Courts began referring to the claims brought under the 1991 amendments as "mixed-motive" claims and analyzed them under a two-part framework.[53] Later, in 2003, the Supreme Court decided the question it left unresolved in *Price Waterhouse* and held the direct/circumstantial evidence dichotomy would not be imported into the mixed-motive context under Title VII.[54]

During this same time period, some courts began doubting that the inferences created by *McDonnell Douglas* made sense in reverse discrimination cases, where the plaintiff was not a member of a historical-

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45. 490 U.S. 228, 242 (1989), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

46. *Price Waterhouse*, 490 U.S. at 244–45. For a description of how the same decision language was imported from constitutional claims, see Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 298–301 (2010).

47. *Price Waterhouse*, 490 U.S. at 244–45.

48. *See id.* at 271 (O'Connor, J., concurring) (noting that to get the benefit of the mixed-motive framework, the plaintiff would be required to present direct evidence of discrimination).

49. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107(a), § 703, 105 Stat. 1071, 1075 (codified as amended 42 U.S.C. § 2000e-2(m) (2006)).

50. *Id.*

51. *Id.*

52. *Id.* sec. 107(a), § 703, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(m)), sec. 107(b), § 706(g), 105 Stat. 1071, 1075–76 (codified as amended at 42 U.S.C. § 2000e-5(g)(2)(B)). As with the disparate impact framework, when Congress added the motivating factor language to Title VII, it did not make similar changes to the ADEA or ADA. Struve, *supra* note 46, at 290, 318. In *Gross v. FBL Financial Services, Inc.*, the Supreme Court considered whether mixed-motive claims were actionable under the ADEA. It held that plaintiffs proceeding under the ADEA must prove that age was the but-for cause of the alleged employment action. 129 S. Ct. 2343, 2350 (2009).

53. *See, e.g.*, Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005).

54. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 92–93 (2003).

ly discriminated against group.[55] Some, but not all, circuits modified *McDonnell Douglas* in reverse discrimination cases to require the plaintiff to proffer additional evidence suggesting that the employer was the rare employer that would discriminate against men or white individuals.[56]

By now, the reader should be able to predict how the courts would handle harassment. During the 1970s, plaintiffs began bringing claims alleging that they were subjected to harassment or requests for sexual favors.[57] The number of harassment claims dramatically increased in the early 1980s.[58] In 1986, the Supreme Court officially recognized harassment as a type of discrimination.[59] In doing so, it began to develop a structure for analyzing harassment and indicated that a hostile work environment must affect the terms, conditions, or privileges of employment to be actionable.[60] In interpreting when harassment would rise to this level, the Court held that it must be "sufficiently severe or pervasive 'to alter the

55. *See, e.g.*, Eastridge v. R.I. Coll., 996 F. Supp. 161, 166–67 (D.R.I. 1998) (showing problems that result when analyzing a reverse discrimination case under the *McDonnell Douglas* framework).

56. *See, e.g.*, Farr v. St. Francis Hosp. & Health Ctrs., 570 F.3d 829, 833 (7th Cir. 2009) (explaining that in a reverse discrimination case, the prima facie case is modified to require the plaintiff to show that the employer discriminated against the majority or that something "fishy" is going on (quoting Phelan v. City of Chicago, 347 F.3d 679, 684 (7th Cir. 2003))).

57. Such claims had mixed results. Some lower courts noted that employers could be liable for harassment or requests for sexual favors, while others held that they could not. *Compare* Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (holding company liable for supervisor's demands for sexual favors), Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (finding that a female employee who was asked by a supervisor for sexual favors as a "price for holding her job" advanced a "prima facie case of sex discrimination"), *and* Lucero v. Beth Israel Hosp. & Geriatric Ctr., 479 F. Supp. 452, 454 (D. Colo. 1979) (holding company liable for its employees' racially based harassment of other employees), *with* Fisher v. Flynn, 598 F.2d 663, 665–66 (1st Cir. 1979) (indicating that subjection to sexual advances was not a cognizable claim under Title VII when those advances were not a but-for cause of a subsequent employment consequence), Grayson v. Wickes Corp., 450 F. Supp. 1112, 1118 (D.C. Ill. 1978) ("[T]itle VII does not make an employer responsible for every inconsiderate remark made by office personnel" (alteration in original) (quoting Purvine v. Boyd Coffee Co., No. 75-324, 1976 WL 674, at *2 (D. Or. Oct. 26, 1976))), *aff'd*, 607 F.2d 1194 (7th Cir. 1979), *and* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (indicating that a discriminator's sexual advances toward a female employee appeared "to be nothing more than a personal proclivity, peculiarity or mannerism" and were not cognizable under Title VII), *vacated on other grounds*, 562 F.2d 55 (9th Cir. 1977).

58. *See* Kent D. Streseman, Note, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1283 n.72 (1995) (noting that the Equal Employment Opportunity Commission ("EEOC") saw a massive increase in the number of sexual harassment claims in the early 1980s and reporting only seventy-five sexual harassment charges filed in 1980 but 3,812 in 1981). For a history of the development of sexual harassment doctrine, see Julianne Scott, Student Scholarship, *Pragmatism, Feminist Theory, and the Reconceptualization of Sexual Harassment*, 10 UCLA WOMEN'S L.J. 203 (1999).

59. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

60. *Id.* at 67.

conditions of [the victim's] employment.' "[61] The Court also indicated that the harassing conduct must be unwelcome.[62]

The contours of harassment law continued to develop over the next decade. In 1993, the Supreme Court held that a plaintiff alleging harassment need not allege psychological injury, but would be required to establish that she subjectively believed the work environment was hostile or abusive and that the environment would be so viewed by an objective person.[63] In making this latter inquiry, the Court noted:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[64]

The prior discussion demonstrates how courts developed the current discrimination typology. While the discussion focused on disparate impact, individual disparate treatment, and harassment, it can be applied more broadly to include failure to accommodate,[65] retaliation,[66] and pat-

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61. *Id.* (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

62. *Id.* at 68.

63. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

64. *Id.* at 23. Although there are some variations in construction, courts tend require that a plaintiff alleging sexual harassment prove that she is a member of a protected class, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, and that it affected a term, condition, or privilege of employment. Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 801 (8th Cir. 2009). The fourth element contains both objective and subjective components. It requires the harassment to be "severe or pervasive enough to create an objectively hostile or abusive work environment" as well as requires the victim to subjectively perceive the working conditions to be so altered. *Id.* (quoting *Harris*, 510 U.S. at 21) (internal quotation marks omitted).

Even as the contours of harassment claims became fixed, employer liability for harassment remained unresolved. In 1998, the Supreme Court addressed agency issues. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). Continuing with its reliance on proof structures, the Court once again enunciated a multipart test. An employer is liable for a supervisor's harassment if it results in a tangible employment action. *Burlington Indus.*, 524 U.S. at 762. The Court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. If a supervisor engages in harassment that does not result in a tangible employment action, the employer will be liable for harassment unless the employer can establish an affirmative defense. As articulated by the Court, the affirmative defense has two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.

65. *See, e.g.*, Gratzl v. Office of the Chief Judges of the 12th, 18th, 19th, and 22nd Judicial Circuits, 601 F.3d 674, 678 (7th Cir. 2010) (discussing elements of failure to accommodate claims under ADA). Failure to accommodate does not derive from the same operative language as other discrimination claims. *See* 42 U.S.C. § 2000e(j) (2006) (religious accommodation); 42 U.S.C. §§ 12111(9)–(10), 12112(b)(5)(A) (disability accommodation).

66. *See, e.g.*, Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 46 (1st Cir. 2010) (citing Fantini v. Salem State Coll., 557 F.3d 22, 32 (1st Cir. 2009)) (holding that to

tern or practice.[67] In the pattern or practice context, for example, courts often express a two-part test. In the liability step, the plaintiff must establish that the employer adopted a policy or practice to discriminate based on a protected trait—that discrimination was the defendant's standard operating procedure.[68] If the defendant is unable to rebut the plaintiff's case, the case proceeds to the damages stage.[69]

To describe the history of employment discrimination law through the lens of frameworks is not to suggest that the Supreme Court did not face difficult questions about the scope of employment discrimination law in some of the cases discussed above. Nor is it to suggest that the answers to such questions are easy. Rather, this Article argues that using frameworks was not necessary and that the choice to use frameworks carries with it significant negative consequences. The Article also argues that the use of the frameworks often creates questions that might not otherwise arise—because the questions are about the frameworks themselves, rather than about the substantive discrimination inquiry.

B. *A History of the Workplace, Changing Modes of Discrimination, and Discrimination Theory*

The prior Section presented a history of discrimination law through legal precedent. Another way to view discrimination law historically is by contrasting it with changes in the workplace, with our understanding of how discrimination happens, and with discrimination theory. This Section demonstrates how, since the late 1980s, courts have failed to modify the employment discrimination frameworks to reflect these changes in the workplace. It also suggests that it is nearly impossible for courts to create frameworks that anticipate future changes in the workplace and discrimination theory, especially given that some of these changes are responses to court-created employment discrimination doctrines.

In the 1960s, discrimination was conceived largely as a result of animus toward a protected group that often manifested itself in explicit company policies.[70] In the late 1960s and 1970s, courts began to recognize that

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make out a prima facie case of retaliation the plaintiff must follow the same burden-shifting framework as in *McDonnell Douglas*). At times, retaliation claims derive from a statute's primary operative language; at other times, statutes have separate retaliation provisions. *See, e.g.*, Title VII § 704(a), 42 U.S.C. § 2000e-3(a) (Title VII retaliation provision); Gomez-Perez v. Potter, 553 U.S. 474 (2008) (construing ADEA federal sector discrimination prohibition to also prohibit retaliation).

67. *See, e.g.*, Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 178 (3d Cir. 2009) (describing pattern or practice framework). The Supreme Court enunciated the pattern or practice framework in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), drawing from its earlier decision in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). *See also* Title VII § 707(a), 42 U.S.C. § 2000e-6(a) (allowing EEOC to file pattern or practice suits).

68. *Hohider*, 574 F.3d at 177–78.

69. *Id.*

70. *See supra* notes 30–32 and accompanying text.

discrimination might not be caused by animus, but rather by seemingly neutral policies that limited the opportunities of a protected class and that were not justified by business necessity.[71] Courts also recognized that women might be disadvantaged in the workplace when subjected to sexual requests. In the late 1980s, courts grappled with the idea that employers might be motivated by both discriminatory and nondiscriminatory reasons when making employment decisions.[72] In the first decades after Title VII's enactment, the courts were constantly considering how to shape the law to handle new understandings of how discrimination occurs. Since the late 1980s, however, the courts have appeared reluctant to adapt discrimination law, despite a growing literature suggesting a more complex view of discrimination and its motivations, as well as changes occurring in the workplace.

In the past twenty years, ideas about work and the workplace have radically changed. Many employees do not work in strict hierarchal structures where one boss is responsible for making employment decisions. Rather, employment decisions are frequently made by groups of individuals, and the decisionmaking process is often devised or overseen by human resources offices. Indeed, the predominance of the human resources function may, at least in part, be a response to the employment discrimination statutes themselves.[73] The advent of the 360-degree review means that evaluations of an individual's job performance are not always driven by the employee's superiors.[74]

Not only has the structure of the workplace changed, so has its makeup. The number of women in the American workforce is about to surpass the number of men for the first time in history.[75] While no one argues that these numbers represent gender equality in employment, they will no doubt im-

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71. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

72. *See supra* notes 45–54 and accompanying text.

73. For example, a human resources department can assist employers in engaging in the interactive process required for accommodations under the ADA and with creating, distributing, and enforcing the sexual harassment policies contemplated in the *Faragher/Ellerth* affirmative defense. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 776 (1998) (discussing two-part affirmative defense); Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 622–28 (2004) (describing the interactive process); Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 15 (2001) (discussing human resources responses); Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1253 (2006) (noting that human resources department is a risk-mitigation strategy); Hope A. Comisky, *Guidelines for Successfully Engaging in the Interactive Process to Find a Reasonable Accommodation Under the Americans with Disabilities Act*, 13 LAB. LAW. 499, 502–09 (1998) (discussing how an employer should engage in the process).

74. *See* David K. Kessler, *The More You Know: How 360-Degree Feedback Could Help Federal District Judges*, 62 RUTGERS L. REV. 687, 701–02 (2010) (describing 360-degree review).

75. Catherine Rampell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES, Feb. 6, 2009, at A1.

pact how courts view women as a protected class. It is also likely that ideas about discrimination will continue to change as society begins to consider whether it is entering what some have termed a "post-racial era," symbolized in part by the election of President Barack Obama.[76] Sex and race discrimination are unfortunately still present, and discrimination law must remain nimble enough to adapt to the ever-changing contours of the workplace.

Over the past few decades, scholars also have contributed to an ever-richer understanding of potential theoretical bases for discrimination claims. As women have entered the workplace in increasing numbers, many have criticized Title VII's focus on formal equality for failing to recognize the realities of life for women, who, on average, continue to disproportionately bear child- and elder-care responsibilities and who deal with the physical realities of pregnancy.[77] Legal theorists also criticize the failure of disparate impact law to combat workplace policies that disproportionately affect pregnant women or women with child- or elder-care responsibilities, such as inflexible start times, policies prohibiting eating or drinking during work, and policies prohibiting leave or providing limited numbers of sick days.[78]

Early theories of discrimination focused on the bad motive of the employer or a particular employee.[79] Research and scholarly efforts now posit that normal mental processes, even in well-meaning individuals, may lead to biased thinking about a protected class.[80] Studies suggest that discrimination is not a constant motive, but rather a factor that may slip in and out of decisionmaking depending on the factual context. For example, one study found that participants ranked black and white candidates equally when the candidates were either plainly qualified or plainly unqualified, but gave lower scores to marginally qualified black candidates than to similarly marginally qualified white candidates.[81]

Work in intersectional discrimination has shown that discrimination may occur in different ways at the intersection of multiple protected classes.[82] Structural discrimination theorists have proposed that the locus of discrimination is not always a bad individual or a formal company policy but rather

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76. *See generally* Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO L.J. 967 (2010) (discussing whether America is entering a postracial era).

77. *See, e.g.*, Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 570 (2010).

78. *Id.* at 582.

79. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745 (2005).

80. *Id.* at 746; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–25 (1987).

81. John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 315 (2000).

82. *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (arguing that discrimination theory does not fully address discrimination against black women).

workplace structures that allow and encourage discrimination.[83] Others have questioned whether women and people of color suffer discrimination by being required to adopt workplace identities that are structured on white, male norms.[84]

Recent research also raises serious questions about how free from bias seemingly neutral evaluations are. These studies suggest that women are evaluated differently than men even when judged on the same criteria, and that such evaluations may change based on whether the woman is in a traditionally male-dominated field and whether she is pregnant or a mother.[85] Studies have shown that a pregnant woman receives lower evaluations than a nonpregnant woman performing the same task.[86] A woman's pregnancy may cause others to view her as overly emotional, irrational, and less committed to her job.[87]

Research shows that when people complain about "discrimination," they are complaining not only about large workplace decisions but also about smaller ones, such as social isolation or biased evaluations.[88] Discrimination theorists have pointed out that the day-to-day, small insults of discrimination—referred to as microagressions—can have significant effects on workers.[89] Research also suggests even low levels of disproportionate impact can have huge effects on the advancement of women and people of color within organizations.[90]

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83. Ryan Light et al., *Racial Discrimination, Interpretation, and Legitimation at Work*, ANNALS AM. ACAD. POL. & SOC. SCI. 39 (Mar. 2011) (noting the way in which workplace policies contribute to discrimination); Pager & Shepherd, *supra* note 3, 193–94, 197 (discussing research regarding organizational dynamics and discrimination); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 138 (2003).

84. *E.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262–63 (2000).

85. *See* Grossman, *supra* note 77, at 577.

86. *E.g.*, Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORGANIZATIONAL BEHAV. 649, 655 (1993).

87. *Id.*

88. One study has stated as follows:

> Because [women's] input may be deemed less valuable, they are more likely than men to be omitted from key discussions, overlooked when perspectives are being sought about important decisions, and left out of informal networks that provide the context for critical information-sharing. Others in the workplace are less likely to come to them for help precisely because they are viewed as lacking essential traits for success, thus creating a system where women are cut off from opportunities to exert influence.

Brian Welle & Madeline E. Heilman, *Formal and Informal Discrimination Against Women at Work: The Role of Gender Stereotypes* 29 (Ctr. for Pub. Leadership Working Paper Series, No. 05-02, 2005), *available at* http://dspace.mit.edu/handle/1721.1/55933.

89. *See generally* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (describing microaggression and how it affects those subjected to it).

90. *See* NAT'L RESEARCH COUNCIL, MEASURING RACIAL DISCRIMINATION 223–24 (Rebecca M. Blank et al. eds., 2004).

Current doctrine makes incorrect factual assumptions about the level of harm that a plaintiff must experience before her claim is actionable.[91] Even though workers report feeling discrimination through both large and small actions, the current typology focuses on large problems, with disparate impact captured by the concept of gross statistical disparities and disparate treatment still focused on actions such as termination, failure to hire, demotion, or severe or pervasive harassment.[92]

The current discrimination frameworks remain largely unconnected to this changing practical and theoretical landscape. The division of discrimination claims into intentional claims and disparate impact claims ignores that discrimination may result from a combination of unconscious bias and traditionally conceived intentional bias,[93] or perhaps through unconscious bias alone. Neither disparate impact nor disparate treatment recognizes the possibility of negligent discrimination.[94] Structural discrimination is not fully captured within any of the frameworks.

In the individual disparate treatment context, courts largely seem to view discrimination as being motivated by an individual who possesses a bad motive.[95] The proof structures appear tied to a concept of discrimination that seeks to ferret out a single decisionmaker (or small group of decisionmakers) who acted with a certain kind of animus toward an individual plaintiff. This narrow concept of intent ignores the possibility of disparate influences and structural discrimination. And none of the proof structures appropriately captures intersectional discrimination.

Further, courts have failed to fully explore whether the substantive equality model underlying disparate impact applies in other contexts[96] or whether the current disparate impact tests fairly capture all conduct that might limit a plaintiff's opportunities. Plaintiffs who are unable to offer proof of specific practices that create gross statistical disparities under the disparate impact framework are largely left with models based on formal equality.[97]

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91. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (requiring that harassment be severe or pervasive); Watson v. Potter, 351 F. App'x 103, 105–06 (7th Cir. 2009) (holding that warning letters, poor performance evaluations, and incorrectly marking an employee absent without leave were not adverse employment actions under Title VII).

92. *See, e.g.*, Richard F. Martell et al., *Male-Female Differences: A Computer Simulation*, 51 AM. PSYCHOLOGIST 157–58 (1996).

93. This Article does not express any opinion on whether unconscious bias is intentional or not. Rather, this sentence is meant to contrast unconscious discrimination with more traditional ways of conceiving intentional discrimination as conscious.

94. For a description of negligent discrimination, see generally David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

95. *See* Martin, *supra* note 2, at 374.

96. *See, e.g.*, Grossman, *supra* note 77, at 567, 604–05 (discussing the formal and substantive equality divide).

97. Spivey v. Beverly Enter., Inc., 196 F.3d 1309, 1314 (11th Cir. 1999) (rejecting claim that employer's refusal to grant modified work to pregnant women created a disparate impact, because plaintiff failed to present evidence of gross statistical disparity).

The point of the Section is not to argue for or against a particular conception of discrimination or the workplace, but rather to argue that the broad operative provisions of federal antidiscrimination statutes at least require courts to consider such arguments. Since the late 1980s, however, courts have largely failed to consider new ways of thinking about discrimination and have instead chosen to rely on the existing typology. As discussed throughout this Article, courts should return to the primary language of the federal statutes' operative provisions to explore when an employee's terms and conditions of employment are affected because of a protected trait.

It could plausibly be argued that current dilemmas with discrimination law are caused not by the frameworks but by the courts' failure to add more frameworks over the past two decades. As discussed in Part III, though, the problems inherent in exploring discrimination through typology are unlikely to be fixed with more frameworks. Just as the current frameworks have been unable to keep up with changes in the workplace and new understandings of discrimination, it is likely that future attempts would suffer from the same problems. Further, the sheer number of frameworks makes them procedurally, doctrinally, and theoretically inconsistent and confusing.

II. How the Frameworks Squeeze Out Potentially Cognizable Claims

When considering discrimination claims, judges first tend to place the claim within a particular category and then funnel the evidence through rubrics associated with that category. This two-step process provides the court with a framework through which to view the claim. This Part shows how the frameworks squeeze out cases that potentially establish discrimination under the federal statutes. To that end, this Part is meant to provide illustrations of the squeeze-out effect, which is further examined in subsequent Parts.

Courts ignore potentially cognizable claims in two ways. First, even when a plaintiff's theory of the case fits within recognized categories of discrimination, the claim may be rejected if it does not neatly fit within an accepted rubric. This happens, in part, because the rubrics often fail to reflect the language of the discrimination statutes. And in many cases, courts do not question whether the rubrics ask the correct questions. Second, the frameworks allow courts to implicitly reject new theories of discrimination without explicitly considering their merits.[98]

For employment discrimination frameworks to work as a decisionmaking device, they must facilitate appropriate inquiries. Unfortunately, some of the frameworks provide a standard that is higher than or different from the standard provided in the statute. For example, the sexual harassment rubric

98. Indeed, this type of reasoning explains, at least in part, the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2451, 2553, 2555–56 (2011), in which the majority opinion failed to analyze whether a claim was viable if it drew from several different types of discrimination. This Article does not claim that the frameworks universally cause such problems, but that these problems occur consistently and in enough cases that they should cause concern.

asks whether a plaintiff can establish that the conduct was severe or pervasive. In determining whether this standard is met, courts consider many factors, including whether the harassment is physically threatening.[99] The statutory language, however, simply asks whether the activity affects the terms or conditions of employment.[100] In case after case, courts grant summary judgment for the employer when there is evidence that the conditions of employment have been affected by sex or race. Courts have granted summary judgment in the employer's favor in each of the following cases:

> When a supervisor commented on the plaintiff's figure, told her to wear tighter clothing and told her she was hot;[101]
>
> When a supervisor called a woman a "pretty girl," made grunting noises as she left his office wearing a leather skirt, told her that his office did not get "hot" until she stepped into it, joked that "all pretty girls [should] run around naked" in the office, likened her to Anita Hill in acknowledging his tendency to share comments of a sexual nature with her at the office, and once made gestures suggesting masturbation while conversing;[102]
>
> When the plaintiff alleged co-workers used the "N-word" to refer to participants in a program the plaintiff supervised, alleged an executive referred to those participants as pigs and described an African-American as a "token black," and alleged that racist behavior and racist jokes were tolerated.[103]

These events affect the terms and conditions of employment, yet the frameworks do not ask the same questions posed in the statute. In other words, the severe or pervasive standard may direct courts to impose a standard on plaintiffs higher than that required by Title VII's statutory language.

This Article extensively details the disconnect between the *McDonnell Douglas* test and the statutory language, including the test's sometimes-counterfactual assumption that an inference of discrimination should arise based on proof of a prima facie case, as well as its narrow conception of intent and pretext.[104] Even in cases where plaintiffs present evidence that

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99. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

100. Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (2006).

101. *See* Webb-Edwards v. Orange Cnty. Sheriff's Office, 525 F.3d 1013, 1027 (11th Cir. 2008). It could be argued that the harassment problem is not a framework issue, but a disagreement regarding the substantive limits of harassment law. As discussed in Section III.A., however, the creation of a harassment framework allowed the Supreme Court to downplay the statutory text and to not address whether the framework fully captures the breadth of statutory possibility. Further, the cases that gave rise to the harassment inquiry present fairly extreme instances of harassment, and it is difficult to understand how the Court could determine the extent of potential liability using these cases. *See* Section III.A.

102. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (internal quotation marks omitted).

103. Kelly v. Senior Ctrs., Inc., 169 F. App'x 423, 425 (6th Cir. 2006) (internal quotation marks omitted).

104. In particular, there is no reason to think that a plaintiff who shows the traditional prima facie case should be able to prevail on a claim of reverse discrimination, and it also is

they might have been treated differently because of a protected trait, courts use the *McDonnell Douglas* framework to find no cognizable claim.[105]

The most high-profile example of this is *O'Connor v. Consolidated Coin Caterers Corp.*[106] In that case, the district court granted summary judgment in favor of the employer. The Fourth Circuit affirmed the decision, reasoning that the plaintiff did not have evidence that he was replaced by someone outside his protected class (for the ADEA, under the age of forty), as required under *McDonnell Douglas*. The plaintiff, who was fifty-six, wanted to use evidence that he was replaced by a forty-year-old to support other evidence of discrimination, such as his supervisor's comments that the plaintiff was "too damn old" and that the company needed "young blood."[107] After three years of appellate litigation, the Supreme Court eventually clarified that the plaintiff was not required to prove replacement by someone outside the protected class, only that the comparator was young enough to establish an inference of discrimination. In this case, the framework directed lower courts away from common sense and from the proper discrimination inquiry.

This phenomenon happens in other cases as well. Take, for example, the case of Michael Harmon, a fifty-seven-year-old man who had worked for a company for twenty-eight years without any negative performance evaluations.[108] He worked as a district manager, again without negative performance evaluations, for three years before the company hired a new supervisor.[109] Near the end of the plaintiff's employment, the company hired

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doubtful that the presumption should arise in every case in which a member of one historically discriminated against group is preferred over a member of another such group.

105. Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688 (5th Cir. 1999) (reversing jury verdict and finding that plaintiff had not established age discrimination even though he had evidence of age-related comments and that the reason for his discharge was not factually correct), *rev'd*, 530 U.S. 133 (2000). The Fifth Circuit misunderstood how the first and third steps of the *McDonnell Douglas* test worked in relation to one another. While this problem might be technically complex from a framework perspective, it is difficult to understand how an age discrimination verdict can be reversed and a judgment entered for an employer when the plaintiff had evidence that he was told he was "too damn old to do the job" and that he was so old he must have "come over on the Mayflower." *Id.* at 691; *see also* Ash v. Tyson Foods, Inc., Civ. A. 96-RRA-3257-M, 2004 WL 5138005 (N.D. Ala. Mar. 26, 2004) (granting judgment as a matter of law in favor of employer by using cramped interpretation of pretext, even though plaintiff had evidence to support race discrimination claim, including that supervisor had referred to him as "boy"), *rev'd*, 546 U.S. 454 (2006); Holiness v. Moore-Handley, Inc., 114 F. Supp. 2d 1176, 1183–84 (N.D. Ala 1999) (using *McDonnell Douglas* to grant summary judgment in favor of employer, even though plaintiff had evidence that supervisors disapproved of black employee's relationship with a white coworker).

106. 517 U.S. 308 (1996).

107. O'Connor v. Consol. Coin Caterers Corp., 829 F. Supp. 155, 158 (W.D.N.C. 1993), *aff'd*, 56 F.3d 542 (4th Cir. 1995), *rev'd*, 517 U.S. 308 (1996) (internal quotation marks omitted).

108. Harmon v. Earthgrains Baking Cos., No. 08-5227, 2009 WL 332705, at *1 (6th Cir. Feb. 11, 2009).

109. *Id.*

a thirty-two-year-old to supervise him.[110] On one occasion, the new supervisor told Mr. Harmon: "I bet you think that your older people are your best people . . . . well, they're not. They're not your best people."[111] Two months later, Mr. Harmon received a negative evaluation from his new supervisor.[112] The new supervisor hired two individuals—a twenty-five-year-old and a thirty-seven-year-old—for positions similar to the plaintiff's position.[113]

Two months later, the supervisor recommended that Mr. Harmon be terminated after the supervisor found out that two drivers under Mr. Harmon's supervision were involved in vehicle accidents that Mr. Harmon did not report to higher management. The supervisor claimed that it was company policy to report such accidents, while Mr. Harmon asserted that he did not know about any company policy requiring the further reporting of vehicle accidents.[114] At summary judgment, the employer could not produce any evidence of a written accident-reporting policy, and a company official indicated that the policy that had been conveyed to Mr. Harmon was not accurate. Even though this type of issue would normally have resulted in less serious discipline under company policy, the company terminated Mr. Harmon.[115] An employee who was ten years younger than Mr. Harmon absorbed his duties.

The district court granted summary judgment in favor of the employer, and the Court of Appeals for the Sixth Circuit affirmed.[116] Very predictably, the court first considered whether the plaintiff had direct evidence of discrimination and, finding that he did not, began to funnel the case through the *McDonnell Douglas* test.[117] The appellate court found that Mr. Harmon was not able to show that he had been replaced by a younger employee, because his job responsibilities were absorbed by a current employee.[118] The plaintiff's case failed because he could not make out a prima facie case under the traditionally stated *McDonnell Douglas* test, which the courts articulated as requiring replacement by a younger individual.[119]

Recall that the primary question under the ADEA is whether a plaintiff is terminated because of his age.[120] Here, the plaintiff had evidence of the following: one potentially discriminatory comment, the hiring of a younger manager who immediately began to report problems with the plaintiff, the

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110. *Id.*

111. *Id.* at *1–2 (alteration in original) (internal quotation marks omitted).

112. *Id.* at *2.

113. *Id.* at *4.

114. *Id.* at *2.

115. *See id.*

116. *Id.* at *3.

117. *Id.* at *3–4.

118. *Id.* at *5.

119. *Id.* The opinion continued by considering whether the plaintiff could establish pretext; however, the court considered only whether the plaintiff had any evidence to suggest that the employer's transfer of the plaintiff's job duties to another person was because of age. *Id.*

120. *See supra* note 9.

younger manager's decision to hire younger workers for similar slots, a twenty-eight-year track record with the company, and two instances in which the company did not follow its own policies. While this evidence is not enough to mandate judgment for the plaintiff, it does create an arguable question of fact about whether the company terminated the plaintiff because of his age. Nonetheless, the *McDonnell Douglas* framework did not encourage the court to engage in a searching inquiry regarding whether discrimination occurred.

If courts reject claims that fall within accepted types but outside of traditionally accepted rubrics, it makes sense that the frameworks also make it difficult to prove hybrid claims—that is, claims that draw from one or more of the current types of discrimination but that may not be able to meet the separate proof requirements of any one particular type.

Consider the following case as an example. Two older employees were terminated for violating hospital policy regarding patient privacy.[121] The employees had evidence that they received verbal permission to obtain X-rays from a patient's mother, and there was no written policy regarding the type of permission needed.[122] Indeed, one of the plaintiffs was the patient's grandmother.[123] Nevertheless, the hospital terminated the employees and replaced them with younger workers.[124] The employees also had evidence that, at the time of their termination, the hospital was undertaking a cost-cutting initiative in which employees with seniority were being targeted and replaced with cheaper employees.[125] The district court granted summary judgment in favor of the employer, and the appellate court affirmed. The court first analyzed the case under *McDonnell Douglas*'s narrow conception of pretext and then under disparate impact.[126] Yet the court failed to consider whether the hospital's overall efforts to terminate employees based on seniority (not based on age) could have created an environment where individual supervisors started looking for infractions by older employees in an attempt to get rid of them.

Or take, for example, an employer who uses a multistep promotion process, with some facially neutral elements and other discriminatory elements. Courts faced with a similar case under the current regime would have difficulty analyzing such a claim without breaking it into two separate claims: a disparate impact claim and a disparate treatment claim. Requiring the plain-

121. Allen v. Highlands Hosp. Corp., 545 F.3d 387, 391 (6th Cir. 2008).

122. *Id.*

123. *Id.* at 397.

124. Brief of Appellant at 2, Allen v. Highlands Hosp. Corp., 545 F.3d 387 (6th Cir. 2008) (No. 07-6414), 2007 WL 5580904.

125. *Allen*, 545 F.3d at 392; *see also* Brief of Appellant, *supra* note 124, at 12 (describing how magistrate judge denied plaintiffs the discovery needed to fully make disparate impact case).

126. *Allen*, 545 F.3d at 398–400.

tiff to offer proof under both rubrics, however, may be more than the statute requires.[127]

This problem will become more pronounced as courts begin to use different rubrics to evaluate similar types of claims under Title VII and the ADEA. For example, it is not now clear how a plaintiff who claims that a practice created a disparate impact based on both age and gender would proceed, given that there is one rubric for Title VII claims and another for ADEA claims.[128]

Finally, the frameworks make it easy for courts to avoid explicitly resolving complex questions regarding new types of discrimination. Consider the question of whether structural discrimination is a viable claim.[129] The following hypothetical shows that by proceeding strictly through the frameworks, it is easy to dismiss a structural discrimination claim without ever truly addressing whether such a claim should be viable under the federal statutes.[130]

A company hosts after-work social events for its employees that focus on activities that are traditionally seen as male activities, such as playing golf or other sports. Many women in the workplace feel uncomfortable doing these activities, but feel that they are required to participate. Women who do not attend the events or who perform poorly at them often receive odd criticisms in their evaluations. The employees are evaluated on subjective qualities such as the ability to "fit in."

The company has a very strict absence policy that provides employees with two weeks of leave each year. Over the years, a number of senior, male managers have made comments about the ability of women to work at the company or have made sexualized comments about the appearance of women at the company. For example, men have referred to some of the secretaries as "hot" and have asked them to wear tighter clothes. One manager indicated that women should quit after they have babies, and another asked a woman whether she slept her way to the top. These comments do not meet the legal definition of harassment, but the comments are frequently

127. *See, e.g.*, Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995) (holding that it did not matter that disparate treatment and disparate impact jury questions were combined, because plaintiffs' facts were sufficient to establish intentional discrimination). For other descriptions of facts that cut across various frameworks, see Tristin Green's account of the facts of *Ledbetter v. Goodyear* in *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 364 (2008). *See also* Eisha Jain, Note, *Realizing the Potential of the Joint Harassment/Retaliation Claim*, 117 YALE L.J. 120 (2007) (describing combined disparate treatment and retaliation claims).

128. *See* Title VII § 703(k), 42 U.S.C. § 2000e-2(k) (2006) (providing rubric for Title VII disparate impact); Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (describing the rubric under the ADEA).

129. *See supra* Section I.B.

130. For another example of structural discrimination, see Tristin Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 642–43 (2005).

repeated by employees, and most of the female employees are aware of them.[131] The company has never repudiated the comments.

Over the years, a handful of women have complained about some of these practices, but they have not been corrected. Several women quit in response to the general environment at the company. Most of the managers in the company are men, and there is a noticeable drop-off in the number of women at senior levels of management.

On one annual evaluation, a woman receives comments that she is "too aggressive" and that she needs to try better to fit in. On the next evaluation, the same woman receives a comment that she is "too emotional." No other comments are made toward or about this particular woman. Neither of the comments affects her compensation, but she feels as though the cards are stacked against her for future promotion decisions. Assume that the woman subsequently sues the company for discrimination.

Under the current discrimination frameworks, the woman's case likely would not survive summary judgment, and the court will never have to explicitly decide whether structural discrimination is a viable claim.[132] When the court views the evidence, it will probably divide the evidence into frameworks and determine how the evidence fits into the frameworks. If a plaintiff cannot establish discrimination through any of the frameworks, her claims will fail.

The case is not a pattern or practice claim, because courts tend to require the plaintiff to establish the pattern or practice with similar types of employment decisions or actions, not by simply aggregating all incidents that occur in the workplace. Further, some courts require pattern or practice claims brought by private plaintiffs to be raised as class actions.[133]

The courts tend to view disparate impact, individual disparate treatment, and harassment separately. This scenario presents a mixture of each, along with some negligent conduct. It is likely that structural problems and uncon-

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131. For a discussion of the differences between the ways in which members of different classes perceive the work environment, see Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

132. Semsroth v. City of Wichita, 548 F. Supp. 2d 1203 (D. Kan. 2008), *aff'd*, 555 F.3d 1182 (10th Cir. 2009); Semsroth v. City of Wichita, No. 04-1245-MLB, 2007 WL 1246223 (D. Kan. Apr. 27, 2007), *aff'd in part, rev'd in part*, 304 F. App'x 707 (10th Cir. 2008). In *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992), the Third Circuit reversed a judgment in favor of the plaintiff, holding that the plaintiff could not establish pretext in the firm's decision not to make her partner. In doing so, the appellate court narrowly framed the pretext inquiry, which allowed it to ignore other evidence of discrimination. *Id.* at 526 (focusing narrowly on the employer's asserted reason for its decision). *But see Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1992). Indeed, the district court's recitation of the facts suggests that structural discrimination might have existed at the firm. *Id.* at 1178 (noting that plaintiff was given smaller matters on which to work than those assigned to male associates, that one partner viewed her as incapable of handling large matters, and that plaintiff might have been viewed negatively because of her concerns regarding women's issues); *see also* Powell v. Dallas Morning News L.P., Civil Action No. 3:06–CV–1960–BF, 2011 WL 1119775 (N.D. Tex. Mar. 28, 2011) (dividing and subdividing evidence into frameworks, but never considering the evidence as a whole).

133. *See, e.g.*, Celestine v. Petroleos de Venez. SA, 266 F.3d 343, 355 (5th Cir. 2001).

scious bias contribute to the discriminatory environment. For example, the company thoughtlessly structures its social activities to cater to men and then allows participation in these events to affect performance evaluations. They schedule the events at times that may make it more difficult for people with child care responsibilities to attend, and then factor attendance into performance evaluations. The supervisor may be making too much of the woman's inability to "fit in," and the work environment may make it harder for the woman to fit in.

The absence policy may have a disparate impact on pregnant women or mothers. Because the woman does not claim to be directly affected by this conduct, however, she cannot prevail on that claim. The absence policy may contribute to the fact that there are few female managers in the workplace, which may itself be a reason why other women feel that the environment is discriminatory.

The comments by the male managers set a tone for the business, provide a context for the lack of women in management, and lend support to the plaintiff's belief that her evaluations are discriminatory and that she faces a tough road to be promoted to a management position. However, the comments are not severe or pervasive enough to constitute actionable harass-harassment. Further, the court is likely to assign less persuasive value to comments that were not made directly to the plaintiff.[134] Some courts may find that the comments and evaluations were not part of the same conduct and thus foreclose a harassment claim.[135] Even when combined with the comments made in her evaluation, the plaintiff is still unlikely to be able to meet the severe or pervasive standard required for harassment. The fact that the company did not respond to the complaints about the effects of all of the discriminatory conduct also supports the plaintiff's assertions, but the court may only view complaints about similar conduct as relevant.

The plaintiff cannot prevail on her individual disparate treatment claim because receiving two negative evaluations (without a corresponding compensation decision) does not create a cognizable adverse employment action. She might wait until she was denied a management position and then sue, but few women are likely to invest their human capital in such an endeavor. Even if the evaluation results in a discriminatory compensation decision, the plaintiff may be unable to convince the court that some or all of her evidence is connected to that decision.

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134. *See, e.g.*, Tall v. United Parcel Serv. Co., No. 3:09CV-742-H, 2011 WL 767224, at *6 (W.D. Ky. Feb. 25, 2011) (indicating that comments not directed at the plaintiff are considered less severe); Thompson v. Mem'l Hosp. of Carbondale, 625 F.3d 394, 401 (7th Cir. 2010) (downplaying comments that happened outside plaintiff's presence).

135. *See, e.g.*, Morris v. Conagra Foods, Inc., 435 F. Supp. 2d 887, 903 (N.D. Iowa 2005) (indicating that alleged incidents by coworkers and supervisors could not be used to establish harassment claim). Indeed, limitations periods for filing a charge of discrimination under Title VII, the ADEA, and the ADA often depend upon whether the plaintiff can establish that her allegations are part of the same course of harassment or represent separate courses of conduct or a combination of discrete and discriminatory acts. *See id.* at 908.

This hypothetical strongly suggests that the female employee may have been treated differently in the terms, conditions, and privileges of her employment based on her sex and that broader discrimination is happening in the workplace. However, this case is also one in which the frameworks could justify summary judgment in the employer's favor. Further, the court could dismiss the case without ever grappling with complex questions regarding structural discrimination. The next Part discusses why these decisions would occur.

III. WHY THE FRAMEWORKS LEAD TO FAULTY DECISIONMAKING

While some blame for discrimination law's problems can be placed on particular court opinions, this Part argues that a more appropriate and important source of fault may lie with the way that courts structure the discrimination inquiry. An analysis of the organizational structure demonstrates that when courts use typology to shape the discrimination inquiry they tend to do so in a way that prevents a full exploration of the statutory regime.

This Part begins by describing how frameworks are tied, both theoretically and factually, to the Supreme Court cases in which they were created. Sections III.B and III.C explore one of the most problematic aspects of these frameworks: the metanarrative that guides courts in using them. This metanarrative is a sometimes explicit but often unspoken set of assumptions about how the frameworks operate. Courts often assume that the articulated frameworks represent the complete universe for thinking about employment discrimination. They also presume that frameworks are separate, rather than integrated, parts of a larger regime.

A. *The Frameworks Suffer from Fact and Theory Capture*

Although the frameworks are ostensibly designed for broad application, they often are wedded to the particular facts or theory underlying the cases in which they were created. Indeed, one of the key drawbacks of litigating by frameworks is that judges may not be able to fully transcend the facts of the case before them or their own factual assumptions about discrimination. Nor can judges fully anticipate how future changes in the workplace or understandings about discrimination law will alter the evidence that plaintiffs bring to prove their claims. Enshrining the facts or theories of particular cases into frameworks is problematic, especially when combined with the tendency of lower courts to assume that the frameworks represent the full possibility of statutory claims. This practice creates an unduly limited lens through which to view discrimination.

Let's start with *McDonnell Douglas*. Embedded within the *McDonnell Douglas* inquiry are several sets of facts that masquerade as legal standards. First, the test considers whether the plaintiff was qualified for the position in question. The legal framework mandates consideration of an employee's qualifications, even when the employer's reasons for an employment deci-

sion do not relate to the employee's qualifications and may not be relevant to the underlying discrimination inquiry. In the *McDonnell Douglas* case itself, this prong was not problematic because the parties agreed that the plaintiff was qualified for the job he sought.[136] In other cases, however, this inquiry sometimes sidetracks courts into thinking about whether the plaintiff is a "bad" employee or an unqualified applicant instead of whether discrimination occurred,[137] and it creates an extra incentive for the employer to cast the employee as unqualified.

One common articulation of *McDonnell Douglas* allows the plaintiff to create a prima facie case by showing that she was a member of a protected group, that she applied for a position for which she was qualified, that she was not hired, and that a person outside of the protected group was chosen instead.[138] After this prima facie case is met, a rebuttable presumption of discrimination arises.[139] Creating a presumption of discrimination may make sense if one is thinking about cases that fall into particular fact patterns. But there is little reason to think that the presumption should arise in other factual scenarios, such as when 100 people apply for one position and the employer chooses the most qualified person. Further, the comparison required in the prima facie case presumes that the plaintiff will be a member of a historically discriminated against group. Thus, it is questionable whether the presumption makes sense in reverse discrimination cases. Questions remain regarding how the prima facie case should work when the plaintiff alleges intersectional discrimination or when the favored employee is also a member of a historically discriminated against group.

The pretext framework also enshrines a limited conception of workplace decisionmaking. The question in *McDonnell Douglas* was whether the company discriminated against the plaintiff because of his illegal protest activities or whether the company used these activities as an excuse to cover up a racially motivated decision not to rehire him. The *McDonnell Douglas* test, therefore, focuses on a single decision made at a particular point in time. In other situations with multiple players and multiple decisions or actions being taken over time, *McDonnell Douglas* has proven problematic.[140]

Further, based on the facts of the initial case, the *McDonnell Douglas* inquiry made a big assumption—that there would be two competing narratives of what occurred in the workplace, one based on legitimate reasons and the other based on discriminatory ones. The framework is set up to find

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136. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 (1973).

137. *See, e.g.*, Nicholson v. Hyannis Air Serv., Inc., 580 F.3d 1116, 1123 (9th Cir. 2009) (noting that district court improperly considered subjective qualifications in prima facie case); Kulik v. Med. Imaging Res., Inc., 325 F. App'x 413, 414 (6th Cir. 2009) (holding that district court improperly relied on subjective qualifications to determine whether plaintiff made a prima facie case).

138. *See, e.g.*, Godoy v. Habersham Cnty., 211 F. App'x 850, 853 (11th Cir. 2006).

139. *Id.*

140. *See, e.g.*, Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1285–86 (2008) (discussing problems with using *McDonnell Douglas* in mixed-motive situations).

the reason for the employer's actions and is thus not well suited to factual scenarios where multiple factors are at work. Given its limitations, *McDonnell Douglas* was not set up to do the work required for mixed-motive claims without substantial revision. These limitations thus necessitated new tests to deal with mixed motives and created confusion about whether such claims were cognizable under the federal discrimination statutes.

The *McDonnell Douglas* test also funnels the discrimination inquiry into a narrowly defined version of pretext, which affects how courts think about intent.[141] Such an inquiry assumes that discrimination results from an intentional act or discrete series of acts, and it envisions that the truth can be ferreted out by simply considering whether the plaintiff's or the defendant's articulated reason for the employment action is true. While this account of discrimination may be correct in certain cases, it simplifies workplace realities and undertheorizes discrimination.[142] In some cases, the employer may be telling the truth about the reason for its actions, but that truth may result from embedded discrimination.[143] Similarly, the pretext inquiry limits courts' willingness to consider claims of unconscious discrimination[144] and structural discrimination, which do not fall neatly within the contours of the *McDonnell Douglas* test.

Disparate impact analysis suffers from the same problems. The Supreme Court first recognized disparate impact claims in *Griggs*, in the context of standardized tests and diploma requirements that created built-in headwinds for black employees.[145] Some courts view the theoretical underpinning of the disparate impact framework as an attempt to remedy the residue of past discrimination.[146] This theoretical tie limits the useful-

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141. *See* Hart, *supra* note 79, at 749, 756–57.

142. *See* Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443, 450–51 (2010).

143. *See, e.g.*, Jason Zengerle, *Black Quarterbacks Are Underpaid*, N.Y. TIMES, Dec. 13, 2009 (Magazine), at MM30.

144. *See* Oppenheimer, *supra* note 94, at 900 (describing negligent discrimination as occurring when an employer fails "to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur"). Unconscious discrimination occurs when normal cognitive processes or cultural indoctrination cause an individual to unthinkingly harbor negative ideas about a protected class, and those thoughts then manifest themselves in an employment action without express animus. Hart, *supra* note 79; *see also* Michael Selmi, *Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1236 (1999) (indicating that it is difficult to define unconscious discrimination). In some instances, unconscious discrimination and negligent discrimination may overlap. For example, it may be possible to hold an employer liable for unconscious discrimination when it allows unconscious discrimination to manifest itself in employment decisions in ways that one might expect the employer to know about and correct.

145. Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).

146. *See, e.g.*, Smith v. City of Jackson, 351 F.3d 183, 202 (5th Cir. 2003) (Stewart, J., concurring in part and dissenting in part) (discussing how the majority improperly limited *Griggs* by holding that it was tied to remedying historic discrimination), *aff'd on other grounds*, 544 U.S. 228 (2005).

ness of the framework in other contexts.[147] For example, some courts have expressed hostility toward claims that employers discriminate against women by failing to provide ample leave, reasoning that "disparate impact liability is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism."[148] Other courts have refused to consider disparate impact claims that benefit cuts and wage cuts correlated with age because these cuts were not "built-in headwinds."[149] Reluctance to fully explore the possibility that such claims establish disparate impact is driven by the theory of *Griggs*.

Further, the idea that disparate impact and disparate treatment are separate concepts comes from *Griggs*. In that case, the Court emphasized that the lower courts had not found intentional discrimination under the facts of the case. From *Griggs* forward, courts began to think about disparate impact as a separate category of discrimination from intentional claims. As discussed below, while some cases do fall within only one of the categories, the strict separation of the categories prevents some plaintiffs from establishing a claim, even where the facts suggests that discrimination has occurred. Professor Tristin Green has noted that disparate impact theory "fails to capture [the] interplay between individuals and the organizations within which they work . . . [by] focusing on the unequal effect or consequence . . . rather than on the ways in which institutional structure, systems, and dynamics enable the operation of discriminatory bias."[150]

Similar problems affect harassment law. The harassment inquiry enshrines the idea that harassment does not affect the terms or conditions of an employee's work environment unless it is severe. This is a factual assumption made by judges, however, and does not reflect the statutory language, which only requires that the terms or conditions of plaintiff's employment were affected or that the conduct did or tended to deprive a plaintiff of employment opportunities.

The plaintiff in *Meritor Savings Bank v. Vinson* certainly raised severe allegations of harassment; she alleged that she was fondled at work and raped by her supervisor.[151] But the justices thinking about this set of facts and beginning to define a harassment framework against the contours of those facts likely did not consider the full range of conduct that might alter

147. *See, e.g.*, Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994); Walker v. E. Allen Cnty. Schs., No. 1:08CV 32 PPS, 2010 WL 1652958, at *5 (N.D. Ind. Apr. 23, 2010) ("[A] market based response to economic adversity is not the type of situation disparate impact claims were intended to address.").

148. *Troupe*, 20 F.3d at 738.

149. *Griggs*, 401 U.S. at 432 (internal quotation marks omitted); *see, e.g.*, Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1164 (7th Cir. 1992) ("The concept of disparate impact was developed for the purpose of identifying situations where, through inertia or insensitivity, companies were following policies that gratuitously—needlessly—although not necessarily deliberately, excluded black or female workers from equal employment opportunities." (citations omitted)).

150. Green, *supra* note 83, at 138.

151. 477 U.S. 57, 60 (1986).

the terms and conditions of a person's employment—which is the standard required by the statute. While physical assault certainly is serious enough to warrant federal protection, using a framework established in this factual context means that conduct that is arguably prohibited under the broad statutory language is not prohibited under the court-created framework.

In ways both large and small, the discrimination frameworks remain factually and theoretically captured by the original cases in which they were decided. These limitations are problematic because the frameworks purport to be designed to have broad future applicability. The memorialization of facts and theories into frameworks unnecessarily cabins the discrimination inquiry into a narrow band of theoretical and factual possibility.

B. *Courts Tend to View the Frameworks as Complete*

In general, courts apply the current frameworks as if they represented a complete lens through which to view discrimination claims.[152] If a set of facts does not fit within a recognized framework, it is not considered to violate the statutes, and the claim is therefore not cognizable. Given that the frameworks were under rapid development in the 1970s and 1980s, it seems rather shortsighted to treat the current iterations as complete. This state of affairs is even more perplexing considering the changes in the workplace and discrimination theory that have occurred over the last two decades. Yet courts persist, both explicitly and implicitly, to think of the recognized structures as representing the entire set of analytical tools available to evaluate discrimination claims.

Such assumptions are found in numerous statements throughout court decisions. For example, courts often proclaim that "[a] plaintiff can bring a Title VII claim under either a disparate treatment theory or a disparate impact theory."[153] The Supreme Court has articulated, "This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact."[154]

Concrete examples regarding the effects of the completeness assumption are helpful. Courts have held, without much explanation, that an individual plaintiff does not state a cognizable claim under the discrimination statutes if she alleges negligent discrimination but cannot meet the

152. *See* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009) ("Few propositions are less controversial or more embedded in the structure of Title VII analysis than that the statute recognizes only 'disparate treatment' and 'disparate impact' theories of employment discrimination." (footnote omitted) (internal quotation marks omitted)).

153. Fuller v. Gen. Cable Indus., Inc., 81 F. Supp. 2d 726, 727 (E.D. Tex. 2000); Carpenter v. Boeing Co., 456 F.3d 1183, 1186 (10th Cir. 2006).

154. Olmstead v. Zimring *ex rel.* L.C., 527 U.S. 581, 617 n.2 (1999) (Thomas, J., dissenting); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

proof required under disparate impact.[155] When courts do so, the rationale is often simple: individual disparate treatment cases require proof of intent.[156]

While it may be true that the Supreme Court has outlined a kind of discrimination claim called disparate treatment and, at least in some instances, has noted that such claims require intent, it does not follow that the courts have considered whether negligent discrimination is cognizable. Failure to consider the possibility of another "type" of discrimination is an understandable mistake if one thinks that the enunciated tests represent a complete articulation of the discrimination statutes' reach.

Such a failure is especially strange in the context of negligent discrimination claims, because ideas of negligence abound within the accepted discrimination frameworks. In Title VII disparate impact cases, a plaintiff can prevail if she can show that the employer failed to adopt less discriminatory alternatives.[157] In at least some instances, then, the employer may be held liable for its negligence in failing to consider all of the possible ways to make a certain kind of decision.[158] Further, if a coworker or a third party harasses a plaintiff, the employer can be held liable for its negligence in failing to remedy the harassment.[159] Because negligent discrimination has not been systematized into a framework, however, courts remain reluctant to fully consider whether such a claim can be brought under the discrimination

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155. *See, e.g.*, Aaron v. Sears, Roebuck & Co., No. 3:08 CV 1471, 2009 WL 803586, at *2 (N.D. Ohio Mar. 25, 2009) ("He also alleges Defendant was merely 'negligent' in its hiring practices, which does not rise to the standard of intentional discrimination required by Title VII." (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1981))); Jalal v. Columbia Univ., 4 F. Supp. 2d 224, 240 (S.D.N.Y. 1998) ("Perhaps Cole was negligent in not conducting some sort of investigation when he was confronted with Harris' objection, innuendo though it was. Title VII, however, provides no remedy for negligent discrimination (if such a thing is possible): Only action taken with an *intent* to discriminate is prohibited." (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981))); *see generally* Oppenheimer, *supra* note 94. It should be noted that courts do recognize employer liability for negligence where the employer has failed to take action to prevent or correct harassment, but that liability depends on a showing of harassment. *See, e.g.*, Zarazed v. Spar Mgmt. Servs., Inc., No. Civ.A. 05-2621, 2006 WL 224050, at *7 (E.D. Pa. Jan. 27, 2006).

156. *See, e.g.*, *Aaron*, 2009 WL 803586, at *2; *Jalal*, 4 F. Supp. 2d at 241. Evidence suggests that plaintiffs' lawyers are reluctant to make negligence claims under Title VII. For example, a defendant's memorandum stated:

> Negligence is not a separate cause of action under Title VII. If it were, this cause of action would be pled by some attorney in the United State.[sic] other than David Deratzian, counsel for the Plaintiff. A Westlaw search concerning a cause of action for negligence under Title VII reveals only lawsuits filed by Mr. Deratzian. While credit should be given to Mr. Deratzian for creativity, such credit cannot be extended to create a bona fide cause of action for Negligence under Title VII.

King v. Lehigh Univ., No. 06-4385, 2007 WL 211278, at *2 (E.D. Pa. Jan. 23, 2007) (alteration in original).

157. Title VII § 703(k)(1)(A)(ii), 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006).

158. Oppenheimer, *supra* note 94, at 932–33.

159. Pickett v. Sheridan Health Care Ctr., 610 F.3d 434, 441 (7th Cir. 2010); Zatz, *supra* note 152, at 1371.

statutes. Conceiving discrimination in this limited manner also causes courts to reject, with little consideration, claims of structural discrimination and unconscious discrimination, each of which at least arguably fits within the broad statutory language of the federal discrimination statutes.[160]

The same problem is presented when a plaintiff's facts arguably fit within a recognized category of discrimination but do not fall neatly within one of the rubrics associated with that category. For example, some courts explicitly hold that a plaintiff who alleges individual disparate treatment based on a single motive must proceed through one of two methods: direct evidence or *McDonnell Douglas*.[161] Other courts list both methods for pursuing individual disparate treatment claims without express words of limitation; implicit within the list, however, is the impression that the courts view the list as being complete.[162]

If a case is based on circumstantial evidence and is brought by an individual alleging a single motive, many courts will reflexively funnel that inquiry through *McDonnell Douglas*. As discussed above, however, it is unclear why *McDonnell Douglas* is an appropriate test to use in all single motive cases. Courts simply fail to consider that perhaps *McDonnell Douglas*'s articulation of pretext does not represent a full account of discrimination where circumstantial evidence is present.

As a result of the assumed completeness of the frameworks, courts may dismiss claims that are arguably cognizable under the federal statutes. Courts rarely acknowledge that they are operating under an assumption of completeness, and their failure to do so can have negative consequences for plaintiffs. In one case, a district court judge lamented that even though the

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160. Hart, *supra* note 79, at 749 (noting that courts have discounted the possibility that Title VII covers unconscious discrimination); McGinley, *supra* note 142, at 450. For further description of structural discrimination, see Green, *supra* note 83, at 138 and Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1231 (1995).

161. *See, e.g.*, McCraven v. City of Chicago, 109 F. Supp. 2d 935, 941 (N.D. Ill. 2000) ("The two methods of establishing disparate treatment discrimination are by direct evidence (taking the form of 'I refused to hire you because of your race'), or by indirect evidence under the *McDonnell Douglas* burden-shifting approach." (citing Hasham v. Cal. State Bd. of Equalization, 200 F.3d 1035, 1044 (7th Cir. 2000))); Jensvold v. Shalala, 925 F. Supp. 1109, 1112–13 (D. Md. 1996) ("Plaintiff can satisfy her burden of proof through either direct proof of discriminatory intent . . . or through the indirect, burden-shifting method of proof set forth in *McDonnell Douglas*." (citations omitted)), *aff'd*, 141 F.3d 1158 (4th Cir. 1998).

162. *See, e.g.*, Egonmwan v. Cook Cnty. Sheriff's Dep't, 602 F.3d 845, 850 (7th Cir. 2010); Thompson v. Carrier Corp., 358 F. App'x 109, 111 (11th Cir. 2009) (per curiam) ("A plaintiff may establish a claim of discrimination under Title VII by direct or circumstantial evidence, and when only the latter is relied on, we use the burden-shifting framework established in [*McDonnell Douglas*] . . . ." (citations omitted)); Taylor v. Seton-Brackenridge Hosp., 349 F. App'x 874, 877 (5th Cir. 2009) ("Taylor has not provided direct evidence of discrimination, therefore, his claim based on circumstantial evidence is analyzed under the burden-shifting framework established in *McDonnell Douglas*." (citations omitted)). Some courts allow claims to proceed through the direct framework if the plaintiff presents direct evidence of discrimination or a convincing mosaic of circumstantial evidence. *See* Mach v. Will Cnty. Sheriff, 580 F.3d 495, 499 (7th Cir. 2009).

plaintiff might not have been considered equally for a job due to his race, he was required to grant summary judgment for the employer under *McDonnell Douglas*.[163] Unfortunately, the district court judge did not consider that perhaps he was free under the broad statutory language of Title VII to at least consider another interpretation of discrimination.

C. *Courts Tend to Treat the Frameworks as Separate*

Cognitive research suggests that placing items in different categories causes people to overestimate differences between the items.[164] This is one of the reasons why substantive discrimination happens. It is not surprising, then, that when courts use frameworks, the separateness of those frameworks creates or justifies differences that do not actually exist in the statutory language or in discrimination theory. Often it seems as though the courts view the frameworks as completely separate constructs, rather than as parts of a unified whole.

Perhaps the most significant example of separateness can be found in courts' insistence that disparate impact and disparate treatment claims differ in fundamental ways.[165] For example, it is common for a court to assert that no intent is required to establish a disparate impact claim, but that some sort of intent (or at least internal causation) is required to establish a disparate treatment claim.[166] The reasoning proceeds along the following lines: There is one type of discrimination—disparate impact—that does not require intent but that requires significant statistical disparities. There is another type of discrimination—disparate treatment—that requires a showing of intent. Therefore, the two types of discrimination are separate constructs that do not blend into each other.

Indeed, some courts have gone so far as to state that the second portion of Title VII's operative language relates to disparate impact, while the first part relates to disparate treatment.[167] Such thinking is not required by the

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163. Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004).

164. *See, e.g.*, Anne Locksley et al., *Social Categorization and Discriminatory Behavior: Extinguishing the Minimal Intergroup Discrimination Effect*, 39 J. PERSONALITY & SOC. PSYCHOL. 773, 776–83 (1980); David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, *in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 213, 217 (David L. Hamilton ed., 1981).

165. *E.g.*, Moore v. Boeing Co., No. 4:02CV80 CDP, 2004 WL 3202777, at *5 (E.D. Mo. Mar. 31, 2004) ("[D]isparate treatment and disparate impact cases do differ fundamentally. Disparate treatment occurs when a plaintiff is intentionally treated less favorably than others because of her sex. Disparate impact, on the other hand, exists where an employment practice, although neutral on its face, has a disproportionally negative effect on the plaintiff."); Daniels v. Nationwide Ins., No. 99 C 757, 1999 WL 753945, at *2 (N.D. Ill. Sept. 17, 1999) ("However, disparate treatment and disparate impact cases differ fundamentally."); *see also* Zatz, *supra* note 152, at 1368–69 (noting that courts consider disparate impact and disparate treatment to constitute exclusive claims, although they may be plead together or in the alternative).

166. The term "internal causation" is used in Zatz, *supra* note 152.

167. *See, e.g.*, Stagi v. Nat'l R.R. Passenger Corp., 391 F. App'x 133, 136 (3d Cir. 2010).

operative language of the federal employment discrimination statutes, but flows from the ways in which the courts tend to think about discrimination frameworks. Rather than provide a principled discussion regarding whether nonintent cases can exist outside of the disparate impact formula, the courts simply resort to the idea that disparate impact and disparate treatment are separate constructs.[168]

Many courts also have held that pattern or practice claims must be brought in the form of class actions.[169] There is little persuasive reasoning given for this distinction, other than the fact that pattern or practice claims are, by their nature, group claims. While the name of this category of claims may suggest a distinction, there is nothing within Title VII's statutory language that requires private plaintiffs to bring pattern or practice claims through the class action mechanism.

The belief that the frameworks justify separate analysis has caused massive confusion in the consideration of single- and mixed-motive frameworks. *McDonnell Douglas* developed as a single-motive framework that does not work well in mixed-motive contexts, because it focuses on *the* reason for a particular action.[170] When mixed motives became an issue under Title VII, the Supreme Court developed a separate framework for considering mixed-motive claims, and some lower courts then began to sharply divide between the available options: either a claim had to pushed into a single-motive framework or into a mixed-motive framework.[171] Although plaintiffs were allowed to plead claims in the alternative, some courts viewed the single-motive inquiry as fundamentally different from the mixed-motive inquiry, requiring different proof structures and different ideas about the required amount of causation.[172] Unfortunately, courts have never adequately examined whether such differences should exist or whether they continue to exist merely because they are products of the ways in which courts organize discrimination claims.

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168. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that plaintiffs could prevail only if they established a specific practice leading to a disparate impact); Allen v. Highlands Hosp. Corp., 545 F.3d 387 (6th Cir. 2008) (refusing to allow plaintiffs to proceed on disparate impact claim based on age because they failed to meet disparate impact test, even though deposition testimony suggested that employer was targeting employees with more seniority for termination).

169. Celestine v. Petroleos de Venez. SA, 266 F.3d 343, 355–56 (5th Cir. 2001).

170. *See* Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 41 (2005). There is an interesting scholarly debate regarding whether the *McDonnell Douglas* test requires a showing of but-for or motivating factor causation. *See* Zimmer, *supra* note 140, at 1288–89. By indicating that *McDonnell Douglas* often funnels discrimination inquiries into consideration of the reason for a decision, this Article does not express a viewpoint on this debate but rather notes the practical effects of the test.

171. *See, e.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005).

172. *See* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 655 (2008) [hereinafter Katz, *Disparate Treatment*].

Many courts further divide single-motive, individual disparate treatment claims into separate rubrics for direct evidence and circumstantial evidence, even though this distinction has been flatly rejected in mixed-motive cases and even though courts have had difficulty defining when evidence is direct and when it is circumstantial.[173]

Further, there is no proof structure that crosses discrimination types. If a plaintiff has a claim that relies on combined theories of disparate impact, disparate treatment, and harassment, but is unable to meet at least one of the individual rubrics, her claim will be dismissed.

When courts combine the idea of separateness with the assumption of completeness, strange consequences result. Consider the following two examples.

As discussed earlier, courts tend to view disparate treatment claims as requiring intent. Therefore, all claims where the plaintiff has no evidence of intent must be funneled through the disparate impact rubric.[174] This kind of analysis is strange because the rubrics the courts use to resolve disparate impact cases cover only a small subset of so-called "nonintentional discrimination" cases—those in which the plaintiff can establish that a specific practice caused a statistical disparity. But the statutory language suggests that plaintiffs should be able to prevail on a nonintentional discrimination claim in other ways. Plaintiffs affected by structural discrimination should be able to testify that employment policies affected them and their coworkers in certain ways, even in cases where it is impossible to develop a statistical case.[175] Additionally, if a plaintiff's evidence is not based solely on statistics, it is difficult to understand why a specific practice requirement should come into play. In other words, plaintiffs should be able to try to establish that many multiple practices combine to create an outcome. Further, under the current frameworks, it is not clear how a plaintiff would proceed if she wanted to pursue a claim based on both unintentional and intentional conduct. There is currently no existing framework for undertaking this analysis.

Also consider the delineation of harassment from individual disparate treatment cases. As courts modified the *McDonnell Douglas* test, they began to require that the plaintiff establish that she suffered an adverse action as part of her prima facie case.[176] In practice, this distinction means that a

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173. *See, e.g.*, Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284–86 (4th Cir. 2004) (applying *McDonnell Douglas* test for single-motive cases and different framework for mixed-motive cases); Costa v. Desert Palace, Inc., 299 F.3d 838, 852–54 (9th Cir. 2002) (describing disarray in court descriptions of direct and circumstantial evidence), *aff'd*, 539 U.S. 90 (2003).

174. *See, e.g.*, Frazier v. Garrison I.S.D., 980 F.2d 1514, 1522–23 (5th Cir. 1993).

175. This might occur, for example, when the workplace is too small to create statistically significant disparities or where there are too few workers in the protected class.

176. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–09 (1993); Cooper v. United Parcel Serv., Inc., 368 F. App'x 469, 473–74 (5th Cir. 2010) (indicating that lateral transfer is not cognizable); Leftwich v. U.S. Steel Corp., 470 F. Supp. 758, 764 (W.D. Pa. 1979). A minority of circuits use the term "ultimate employment action" to define the required level of seriousness. An "ultimate employment action" is stricter than an "adverse action" and

plaintiff often is not able to prove a disparate treatment claim for certain types of conduct that do not meet this legal standard, such as certain types of lateral transfers and negative evaluations. By default, these cases are often forced into a harassment framework, which relies on the severe or pervasive rubric, rather than on a rubric that focuses on adverse employment action. But it is not clear that the harassment framework is the right framework for dealing with this type of conduct, which likely affects the terms or conditions of a person's employment without being either severe or pervasive.[177]

These ideas of separateness and completeness become further enshrined in employment discrimination doctrine when courts begin to develop shorthand for discussing the frameworks. Like many abbreviations, the shorthand descriptions of frameworks lack certain nuances and may introduce assumptions that were not present in the original cases from which the framework is derived. Sometimes the shorthand contains actual mistakes, and as the shorthand version is repeated, the mistakes become the norm. While these abbreviated descriptions are important for efficient operation of courts, they may improperly distort discrimination concepts.

Examples of these abbreviated descriptions are compelling. Some courts have asserted that there are two ways to prove discrimination: disparate treatment, which requires a showing of intent, and disparate impact, which does not.[178] Within this statement are powerful assumptions about the separateness of disparate impact and disparate treatment and about the intent required to prove an individual case when gross statistical disparities are not present. While this language has been repeated in hundreds of cases, it is unclear whether it is a correct statement of the law.

After the Supreme Court established the *McDonnell Douglas* test, courts began describing the circumstances in which it should be used. The Supreme Court has never held that the test is the only way of establishing discrimination claims with circumstantial evidence. Yet, in describing when to use the three-part burden-shifting framework, courts began to transform *McDonnell Douglas* from *a* way of proving such claims into *the* way of proving them.[179]

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requires an action such as a failure to hire, a discharge, a failure to promote, or a compensation decision. *See, e.g.*, Lee v. Dep't of Veterans Affairs, 247 F. App'x 472, 477 (5th Cir. 2007) (per curiam).

177. The same problem appears in cases where the facts show that a plaintiff was discriminated against and the discrimination continued after she filed her complaint. Courts have difficulty deciding whether postcomplaint evidence falls within the discrimination or the retaliation rubric. *See generally* Jain, *supra* note 127.

178. *See, e.g.*, Sanders v. Hughes Aircraft Co., No. 87-5925, 1988 WL 25468, at *2 (9th Cir. Mar. 17, 1988) ("There are two ways a plaintiff may prove race discrimination: disparate treatment and disparate impact."); Ladd v. Boeing Co., No. 06-28, 2008 WL 375725, at *10 (E.D. Pa. Feb. 8, 2008) (same).

179. *See, e.g.*, McCraven v. City of Chicago, 109 F. Supp. 2d 935, 941 (N.D. Ill. 2000) ("The two methods of establishing disparate treatment discrimination are by direct evidence (taking the form of 'I refused to hire you because of your race'), or by indirect evidence under the *McDonnell Douglas* burden-shifting approach."); Jensvold v. Shalala, 925 F. Supp. 1109, 1112–13 (D. Md. 1996) ("Plaintiff can satisfy her burden of proof through either direct proof

Treating the discrimination frameworks as separate is strange because most of the types of discrimination were conceived from Title VII's original language.[180] Further, none of the types of discrimination were explicitly mentioned in that original language. Recall that none of the statutes explicitly mention individual disparate treatment or harassment, or use the words "single motive" or "mixed motive." Until 1991, Title VII did not contain the words "disparate impact," and neither the ADEA nor the ADA uses the terminology.[181] *McDonnell Douglas* is not codified in any statutory language. Nonetheless, using frameworks to think about discrimination causes courts to forget that much of discrimination law's structure and terminology is a judicial gloss; one that is not necessarily required by the underlying statutory regimes.

IV. Other Consequences of Reflexive Reliance on Frameworks

The preceding Parts demonstrate how the frameworks squeeze out claims that are arguably cognizable under the federal discrimination statutes' broad operative language. This Part discusses other important consequences that flow from this typology. First, the contours of discrimination law become defined by path dependence, rather than through direct reasoning. Second, frameworks create theoretical, doctrinal, and procedural confusion.

A. *Courts and Litigants Use Path-Dependent Reasoning of the Frameworks Rather than Direct Reasoning*

After a framework is created, courts often funnel their discrimination inquiries through this typology, rather than through the statutory language. Like the prisoners in the allegory of the cave, courts (and litigants) begin to review discrimination based on a shadow of reality. They become focused on discerning the nuances of the shadows without recognizing that the typology may not fully or accurately capture the statutory language. While the courts appear to vigorously analyze discrimination, they often just tease out the intricacies of the frameworks, leaving discrimination's central questions unexplored. At the same time, it often appears as though the courts have

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of discriminatory intent . . . or through the indirect, burden-shifting method of proof set forth in *McDonnell Douglas*." (citations omitted))

180. Title VII § 703(a)(1)–(2), 42 U.S.C. § 2000e-2(a)(1)–(2) (2006). It is possible to argue that 42 U.S.C. § 2000e-2(a)(1) is the statutory provision relating to disparate treatment, while disparate impact derives from the separate protections under § 2000e-2(a)(2). *E.g.*, L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. Kan. L. Rev. 341, 346 n.18 (2005) (noting that courts have traditionally identified disparate impact and disparate treatment as stemming from different provisions). There is nothing in the statutory language of Title VII, however, that confines either type of discrimination to (a)(1) or (a)(2).

181. *See* Age Discrimination in Employment Act § 4(a), 29 U.S.C. § 623(a) (2006); Americans with Disabilities Act § 102(a)–(b), 42 U.S.C. § 12112(a)–(b).

addressed these central questions. The following discussion illustrates this problem.

Courts tend to consider disparate impact and disparate treatment as distinct kinds of discrimination.[182] Although disparate impact does not require a showing of intent, it does require a specific kind of evidence to make a claim, a statistically significant disparity.[183] Disparate treatment cases, in contrast, require a showing of intent. By default, this dichotomy necessarily excludes unconscious bias and negligent discrimination actions that do not create gross statistical disparities based on a protected class. And, because disparate impact and disparate treatment are separate types of discrimination, it is difficult for courts to consider structural discrimination, which may result as a mixture of unconscious, negligent, and intentional acts.

The exclusion of structural discrimination, negligent discrimination, and unconscious bias from disparate impact and disparate treatment claims derives from the framework mindset, not explicit reasoning. When the Supreme Court first considered disparate impact claims in *Griggs v. Duke Power Co.*, gross statistical disparities existed on the facts of the case before it.[184] As a result of factual capture, these gross statistical disparities[185] became one of the defining features of a new type of discrimination the Court defined as disparate impact discrimination, and Congress later codified this distinction in Title VII.[186] Both the district court and the appellate court in *Griggs* emphasized that the plaintiffs did not have evidence of intentional discrimination, and this condition also became part of the disparate impact narrative.[187]

In later cases, the Supreme Court grafted the specific practice requirement onto disparate impact cases.[188] But the Court first added this requirement in a plurality opinion, in which the implications of requiring a specific practice were not fully briefed by the parties and where the absence of a specific practice requirement was not the primary source of confusion among the lower courts.[189] When the courts began to form a shorthand for

182. Lewis v. City of Chicago, 130 S. Ct. 2191, 2199 (2010); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986–987 (1988) (plurality opinion).

183. Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370, 1376 (2d Cir. 1991).

184. 401 U.S. 424, 430 (1971).

185. *Griggs*, 401 U.S. at 430 n.6 (noting that while 34% of white males had completed high school, only 12% of black males had done so and that 58% of whites passed the standardized tests, in contrast to only 6% of black candidates).

186. 42 U.S.C. § 2000e-2(k).

187. *Griggs*, 401 U.S. at 428.

188. *See supra* note 18 and accompanying text.

189. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion). Congress eventually codified the disparate impact inquiry in Title VII, but modified the court-created framework. Title VII § 703(k), 42 U.S.C. § 2000e-2(k) (2006). This framework is now part of the statute, and courts are required to use it. This does not mean, however, that the framework was well-conceived in the first place or that it describes the only avenue for plaintiffs to establish nonintentional discrimination claims. See Section V.C for further discussion of this issue.

conceptualizing disparate impact claims, they emphasized three items: (1) that disparate impact is separate from disparate treatment; (2) that disparate impact claims do not require intent, unlike disparate treatment claims; and (3) that the plaintiff is required to pinpoint a specific practice that creates the disparate impact.

Courts began to rely on the fact that disparate impact and disparate treatment are different types of discrimination to justify the separateness of both the underlying theory and the doctrinal structures. Yet the Supreme Court has never adequately explained why disparate treatment requires a showing of intent or why claims that do not rely on intent should always be funneled through the disparate impact inquiry.

The dichotomy between an intentional type of discrimination and a non-intentional one might be less problematic if the courts did not also tend to view the current frameworks as complete. When lower courts look at a problem that does not fit neatly within one of the established frameworks, they tend to view such claims as noncognizable and fail to consider that perhaps the courts simply have not addressed the issue.

Distinguishing disparate impact and disparate treatment may have been helpful in the early disparate impact cases and may still offer an efficient way to think of some factual scenarios that give rise to discrimination. In many instances, however, the frameworks prevent courts from fully theorizing and conceptualizing discrimination. Consider the cases discussed in Part III, in which adherence to frameworks may cause courts to ignore the larger question of discrimination.

Indeed, it is often hard to determine why courts do not recognize negligent discrimination or unconscious discrimination claims or why they have difficulty with structural discrimination. There are few well-reasoned opinions examining the federal employment discrimination statutes' language, legislative history, or underlying purposes with respect to these types of claims. Note that this Article does not make any normative claims regarding whether these kinds of discrimination should be cognizable. Rather, it claims that statutory language requires courts to directly consider the viability of these forms of discrimination, and the courts' discussion of these issues would be useful in understanding the contours of discrimination.

Path dependence also explains constrained thinking about how intent is manifested. After *McDonnell Douglas*, three important ideas came to the fore. First, courts began to articulate that circumstantial evidence of discrimination should be considered with different structures than cases presenting direct evidence. This distinction survives in the single-motive context, even though Supreme Court has specifically rejected it in mixed-motive cases[190] and even though the courts have had great difficulty defining direct and circumstantial evidence. Second, the primary inquiry in circumstantial evidence cases is one of pretext. And finally, *McDonnell Douglas* framed

190. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003) (indicating that direct evidence is not required to assert mixed motive under Title VII because the statute does not make a distinction between circumstantial and direct evidence).

intent in a way that focused on finding a single reason for a discriminatory decision. Importantly, none of these turns was required by the underlying case. Rather, the Court could have simply indicated that in some cases a plaintiff may prevail by establishing pretext. Nonetheless, the Court chose to conceptualize disparate treatment through the use of a framework.

After *McDonnell Douglas*, individual disparate treatment cases based on circumstantial evidence are severed from other disparate treatment cases and from discrimination law as a whole. Indeed, the current confusion over whether *McDonnell Douglas* survived the 1991 amendments to Title VII can be blamed, at least in part, on the courts' determination to keep *McDonnell Douglas* as a separate way of thinking about a specific kind of discrimination. Many circuits developed a shorthand that erroneously characterized *McDonnell Douglas* as the only way to think about single-motive discrimination claims based on circumstantial evidence.

The continued use of *McDonnell Douglas* disguises the fact that many important questions in employment discrimination law remain unanswered. These questions include whether there is an actual difference between direct and circumstantial evidence, how intent should be defined, and whether the creation of a rebuttable presumption makes sense given the contours of the modern workplace. Further, by funneling cases through the accepted test—a test that does not fully capture all possible discrimination—a court can easily disregard other possible ways of showing discrimination.

Reasoning by path dependence is not confined to these two areas of employment discrimination law; however, they provide good examples of how the frameworks operate to distract courts from directly addressing important questions.

This path dependence is especially troubling because it has effects outside of the courtroom. Many practicing lawyers also view discrimination through the frameworks, either because they have a formalistic view of the law that situates the frameworks as the definition of discrimination or because they believe it is futile or too costly to litigate against them.[191] When litigants begin to frame their discrimination complaints, they do so within the accepted discrimination frameworks. And when employers consider whether their employment practices are discriminatory, the case law serves as a tool for making such assessments.[192] Even when lawyers or employers see inequality in the workplaces based on protected traits, they may find it difficult to conceptualize why these inequalities would be discriminatory if they fall outside of traditional frameworks. A recent Westlaw search con-

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191. *Age Discrimination in Massachusetts*, CUSHNER & BLOOM, P.C., http://www.cushnerbloom.com/age.htm (last visited May 8, 2011) (indicating that a plaintiff must present direct evidence of discrimination or proceed through the *McDonnell Douglas* framework to prove claims).

192. *See, e.g.*, *Employer Notes*, FROST, BROWN, TODD, LLC, http://fbtemployerlaw.com/age-discrimination-claim-dismissed (last visited May 23, 2011) (discussing recent case in which ADEA case was dismissed because of plaintiff's failure to establish replacement outside his class). This is not to suggest that employers do not at times reach beyond that typology in thinking about discrimination practices in the workplace.

firms little discussion of negligent discrimination in Title VII cases. A separate search shows almost no discussion of structural discrimination in reported cases.

If the courts are not addressing the fundamental questions of employment discrimination, what are they doing? After all, there has been a huge number of Supreme Court cases addressing discrimination law over the past several decades. Since the 1970s, many of Supreme Court employment discrimination cases have centered on the meaning of the frameworks. And two of the 1991 amendments to Title VII were reactions to frameworks.

Think again about the history of employment discrimination law in Section I.A. The Supreme Court created the *McDonnell Douglas* test. In *Texas Department of Community Affairs v. Burdine*,[193] *St. Mary's Honor Center v. Hicks*,[194] *O'Connor v. Consolidated Coin Caterers Corp.*,[195] and *Reeves v. Sanderson Plumbing Products, Inc.*,[196] the Court explained how the test operated. The Court later considered mixed-motive claims in *Price Waterhouse v. Hopkins*. Because *McDonnell Douglas* was conceived in a single-motive context, the Court created another test to think about mixed-motive claims. Congress responded to the test by amending Title VII. Because the Court created a nonstatutory distinction between direct and circumstantial evidence in the individual disparate treatment, single-motive context, the Supreme Court in *Desert Palace* was required to consider whether the distinction exists in the mixed-motive context.[197] The separation of mixed-motive and single-motive claims has raised many questions, such as how and when to distinguish single- and mixed-motive claims, the nature of the pleading requirements for single- and mixed-motive claims, and whether the motivating factor language in the mixed-motive context can be used in the single-motive context.

Within the past decade, the frameworks have caused even more problems, as the federal courts have begun to distinguish the structures under Title VII, the ADEA, and to a lesser extent, the ADA. Today, separate structures exist for disparate impact claims under Title VII and the ADEA.[198] Mixed-motive claims are recognized under Title VII but not under the ADEA.[199] It is unclear whether the *McDonnell Douglas* test should be used in ADEA cases.[200] In many of the instances where the courts have interpreted Title VII and the ADEA differently, it remains unclear whether the ADA will follow a Title VII model, an ADEA model, or yet another model.

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193. 450 U.S. 248, 253 (1981).

194. 509 U.S. 502, 507 (1993).

195. 517 U.S. 308, 310–12 (1996).

196. 530 U.S. 133, 142–43 (2000).

197. Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003).

198. *See* Title VII § 703(k), 42 U.S.C. § 2000e-2(k) (2006); Smith v. City of Jackson, 544 U.S. 228, 253 (2005) (O'Connor, J., concurring).

199. *See* Title VII § 703(m), 42 U.S.C. § 2000e-2(m); Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351 (2009).

200. *Gross*, 129 S. Ct. at 2349 n.2.

These differentiations are not entirely due to differences in the various statutes. Rather, the differences can, in part, be explained as a response to proof structures. In explaining that mixed-motive claims are not cognizable under the ADEA, Justice Thomas expressed skepticism about the *Price Waterhouse* test and noted the endless confusion created by the frameworks.[201]

What is most unfortunate about the history of federal employment discrimination law is how much effort has been diverted from more important inquiries and wasted on frameworks. Imagine, for example, if the Court in *McDonnell Douglas* had simply indicated that pretext was a way of establishing discrimination, without the attendant three-part burden-shifting test. The decade of confusion that resulted in *Burdine* and *Hicks* would have been saved, the direct/circumstantial evidence dichotomy may have been avoided, a broader conception of intent would be possible, and the courts may not have felt compelled to create different tests for single- and mixed-motive claims or to even use the terminology in the first place. And the efforts placed on all of those issues could have been used to answer more fundamental questions about discrimination.

One of the central aims of this Article is to re-establish rigor in the way that courts conceive of and analyze discrimination claims. To do this, courts must examine how much of their thinking about discrimination is driven by its organizational model and how much is actually required by the statutes.

B. *The Frameworks Create Doctrinal, Theoretical, and Procedural Confusion*

Conceiving discrimination through frameworks also makes courts inattentive to the field as a theoretical, doctrinal, and procedural whole. Many of the inconsistencies within the field can be traced to this pattern of thinking. This Section first considers how the frameworks create disunity in discrimination law's theory and doctrine and then discusses procedural problems with the frameworks.

The division between disparate impact and disparate treatment provides an example of the way in which the frameworks create confusion. In adopting disparate impact, the Supreme Court recognized that societal discrimination that occurs outside the workplace could find its way into the workplace through company policies and procedures. In *Griggs*, for example, the Court held that a high school graduation requirement and a written testing requirement unrelated to the job were discriminatory because members of different races had different educational opportunities.[202] Thus, disparate impact claims rely, at least in part, on a theory of substantive equality.

In contrast, disparate treatment claims are largely conceived as based in formal equality: individuals are to be treated the same without regard to their

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201. *Id.* at 2346; *see also* Katz, Gross *Disunity*, *supra* note 2, at 878 (discussing how the Supreme Court's decision in *Gross* may be, in part, a shift away from proof structures)

202. Griggs v. Duke Power Co., 401 U.S. 424, 432–33 (1971).

protected traits. In the disparate treatment context, courts have broadly defined what constitutes a legitimate, nondiscriminatory reason for employment actions. Courts largely defer to the business judgment of employers in enacting job standards, even when those standards might have varying effects on different protected classes, as long as the standards were not implemented to disadvantage any particular protected class.

Whether substantive equality can or should be a basis for claims outside the traditional disparate impact proof structure is an interesting question that federal courts have never fully or significantly addressed. Rather than facing this difficult question, the courts have avoided the issue by using the frameworks, which do not require the courts to consider the issue explicitly. Because only disparate impact claims focus on substantive equality, because disparate treatment claims differ from disparate impact claims, and because disparate treatment requires intent, courts fail to consider whether substantive equality can also be a basis for disparate treatment claims. Further, because the courts presume the completeness of the existing frameworks, they do not endeavor to conceive of a potential third category: a claim grounded in substantive equality that does not rely on proof of specific practices causing gross statistical disparities.[203]

What is strange about this theoretical inconsistency is that disparate treatment and disparate impact were originally conceived from the same operative provisions. If substantive equality is an appropriate basis for disparate impact claims, then there is at least a possibility that it is an appropriate basis for disparate treatment claims. And, if the reach of substantive equality should be limited to disparate impact claims, the courts need to engage in serious consideration of the issue directly

Another source of tension appears with negligent discrimination. The Supreme Court has not defined negligent discrimination as a particular "type" of discrimination. Yet, the idea of negligence abounds within harassment doctrine. Employers are held liable for their own negligence when a coworker or third party harasses a plaintiff.[204] Employers can escape liability for supervisory harassment that does not result in a tangible employment action if the employer has taken reasonable steps to avoid or prevent the harassment.[205] Again, this Article does not argue that negligent discrimination claims should be cognizable. Rather, it argues that where the courts use a particular theoretical model to consider one type of discrimination, they should also consider whether this model can be used in other types. In other words, if negligence principles are used in some discrimination contexts, the

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203. For example, plaintiffs might proceed on proof that several smaller practices that individually did not create a statistical disparity combined to create a statistical disparity, plaintiffs might create (without statistics) a convincing causal narrative suggesting that plaintiffs reasonably perceived facially nondiscriminatory practices as limiting employment opportunities, or the courts might declare that some policies inherently limit or tend to limit the employment opportunities based on a protected trait, such as leave policies that would not plausibly allow a woman to take time off to have a child.

204. Faragher v. City of Boca Raton, 524 U.S. 775, 776 (1998).

205. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

courts should explicitly determine whether a claim for negligent discrimination is cognizable.

The frameworks also lead to doctrinal confusion. Consider the existing dichotomy of direct and circumstantial evidence in single-motive disparate treatment cases. In the mixed-motive context, the Supreme Court has held that the dichotomy does not exist, because the 1991 amendments to Title VII do not draw a distinction between direct and circumstantial evidence.[206] Notably, the original operative language of Title VII also makes no distinction between direct and circumstantial evidence, yet the dichotomy remains for single-motive cases because of reliance on the old frameworks.

Further consider the endless questions that continue to plague courts regarding the continuing viability of *McDonnell Douglas*, its application in other contexts, and the appropriate causal or intent standard for proving individual disparate treatment claims. Important issues—such as whether the causal standard that Congress added to Title VII in the 1991 amendments is a normatively better standard than the ones created by the courts—have not been resolved.[207] Because of dependence on frameworks, however, these questions remain largely unanswered or answered only by default reasoning.

The frameworks also create procedural confusion. The terms "types," "categories," "rubrics," and "frameworks" have been used throughout this Article to avoid connecting these terms with procedural terms of art. However, many difficult questions that arise in employment discrimination cases exist because the courts have been unable to fully and consistently map the frameworks onto accepted procedural concepts.

This first source of confusion arises with the types or categories of discrimination. It remains unclear whether the types of discrimination are separate "claims" under the statutes or whether they are simply ways of clarifying the statutes' primary operative language. This distinction has important consequences for pleading and for later appellate review of whether a plaintiff raised a particular claim. Courts routinely refer to the types of discrimination as claims, but it is not clear that they use the term in its procedural sense.[208]

Consider a plaintiff whose complaint provides that she was not hired for a position with a certain company because of her gender. If her claim is conceived broadly as a Title VII claim, she may be able to develop a case under both disparate treatment and disparate impact theories. If, however, courts conceive of disparate treatment and disparate impact as separate legal claims, the court may require more specific pleading regarding each claim in the complaint. As the federal courts heighten pleading requirements, it be-

206. Desert Palace Inc. v. Costa, 539 U.S. 90, 98–101 (2003).

207. *See* Katz, *Disparate Treatment*, *supra* note 172, at 644 (arguing that the best framework under current law is the 1991 Title VII framework).

208. *See, e.g.*, Lewis v. City of Chicago, 130 S. Ct. 2191, 2198 (2010).

comes increasingly important whether types of discrimination represent separate claims.[209]

In the individual disparate treatment context, a second source of confusion exists because it not completely clear whether the term "mixed motive" describes a type of discrimination, a rubric for evaluating a discrimination claim, or perhaps both. If mixed motive under Title VII is both a type of discrimination and a way of describing the analysis performed under the 1991 amendments, then a plaintiff who proceeds on a disparate treatment claim arguably must plead whether she is proceeding under a single or mixed motive (or plead in the alternative). If the plaintiff only cites the primary operative provisions of Title VII but does not otherwise plead mixed motive, then the court may dismiss any later assertion of mixed motive. A court evaluating a case on summary judgment might refuse to apply a mixed-motive framework to cases in which the plaintiff alleges a single motive and might later refuse to issue jury instructions on mixed motive.

Whether mixed motive is a claim or a way of analyzing a claim also is important because it determines whether plaintiffs who proceed under single-motive cases can use the broader "motivating factor" language provided in the 1991 amendments at both the summary judgment stage and in jury instructions.[210] This issue also raises profound issues regarding whether *McDonnell Douglas* survives as a stand-alone analytical structure and whether the direct/circumstantial evidence dichotomy is still appropriate in single-motive cases.

A third source of procedural confusion relates to whether the structures used to evaluate cases represent the elements of causes of actions or whether they are simply ways for the courts to organize evidence. The confusion is best illustrated by considering *McDonnell Douglas*. Courts often refer to *McDonnell Douglas* as providing the "elements" of a discrimination claim based on circumstantial evidence,[211] and many courts use the test as the standard through which they consider summary judgment motions.[212] Yet the Supreme Court has reiterated that the *McDonnell Douglas* test is merely an evidentiary framework to aid courts in sifting through evidence[213] and has held that it is not necessary for a plaintiff to plead its factors in a complaint.[214] Further, many courts refuse to instruct juries on *McDonnell*

209. In Title VII cases, this issue is even more complex. The concepts of disparate impact and mixed motive were originally created as interpretations of Title VII's primary operative language. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241–43 (1989); Griggs v. Duke Power Co., 401 U.S. 424, 429–32 (1971). However, Congress amended Title VII to include separate provisions for disparate impact and mixed motive. Title VII § 703(k) & (m), 42 U.S.C. § 2000e-2(k) & (m) (2006). It is not clear from these codifications whether disparate impact and mixed motive still fall within the primary operative language of Title VII or whether Congress codified separate claims.

210. Title VII § 703(m), 42 U.S.C. § 2000e-2(m).

211. *E.g.*, Sydney v. ConMed Elec. Surgery, 275 F. App'x 748, 751 (10th Cir. 2008).

212. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 584 (2007).

213. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996).

214. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002).

Douglas if a case reaches trial.[215] To the extent that *McDonnell Douglas* imposes different requirements on parties than they would be required to prove at trial, its use as a summary judgment standard appears problematic under Federal Rule of Civil Procedure 56(c), which provides that summary judgment should be granted when the movant has shown that he or she would be entitled to judgment as a matter of law.[216] Under Rule 50, the standard for granting judgment as a matter of law is whether a reasonable jury could find in favor of the movant on a particular issue.[217] To the extent that *McDonnell Douglas* directs a court to consider issues that are different than the ones a jury would consider, it is procedurally problematic.

Under the current ways that courts think about discrimination, it is likely that some of the rubrics will be categorized as "elements," while others will not be so labeled. As discussed above, characterizing *McDonnell Douglas* as the elements of a claim seems suspect. It is more plausible for courts to conceptualize the disparate impact framework contained in Title VII and the court-created disparate impact framework in ADEA as elements of such claims, because it appears that the courts conceive these tests as providing the only way to approach such claims. While these conclusions are plausible, Section V.A discusses a better way to conceive of the frameworks that provides broader cohesion within federal employment discrimination law.

Questions about how the types and frameworks fit into the procedural classifications in civil procedure will become more important as federal courts strengthen the pleading requirements. This issue is also important because thinking about the types and frameworks as claims and elements increases the tendency to think of them as separate from one another, rather than as parts of a unified statutory scheme.

The doctrinal, theoretical, and procedural confusion discussed in this Section not only is distressing from an intellectual standpoint, but, just as importantly, has real world consequences. As discussed throughout this Article, the circuit courts and the Supreme Court have been resolving problems with the frameworks for decades. Behind these cases are real plaintiffs and defendants. The confusion creates an uncertainty that makes it difficult for parties to determine potential liability both ex post and ex ante. The parties spend much time and effort litigating the frameworks, rather than the actual case, which causes many cases to devolve into gamesmanship. As one scholar noted, "[S]uch a state of affairs breeds cynicism about the law in this

215. *E.g.*, Whittington, Sr. v. Nordam Grp. Inc., 429 F.3d 986, 997–98 (10th Cir. 2005) (asserting that the *McDonnell Douglas* framework increases chances of jury error because of its complexity); Williams v. Eau Claire Pub. Schs., 397 F.3d 441, 446 (6th Cir. 2005) (holding that the *McDonnell Douglas* framework may, but need not, be incorporated into jury instructions); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004) ("This Court has consistently held that district courts should not frame jury instructions based upon the intricacies of the *McDonnell Douglas* burden shifting analysis.").

216. FED. R. CIV. P. 56(c).

217. FED. R. CIV. P. 50.

area, as it suggests that outcomes depend more on technicalities than on the merits of a particular case."[218]

V. VISUALIZING THE CHANGED LANDSCAPE

This Part shows how abandoning the frameworks would alter the field. It addresses the core objections to change, ultimately concluding that many of these objections are either unsupported by evidence or exaggerated, and that the true costs of abandoning the typology are outweighed by the benefits to be gained.

A. *A Return to First Principles*

The proposed solution to the problems caused by the frameworks is simple: the courts should reduce the categories to mere labels and abandon most, if not all, all of the current frameworks. In their place, the courts should return to first principles, fashioning the elements of employment discrimination claims with careful regard to the breadth of the actual statutory language. This Section carefully lays out that solution.

The elements of a discrimination claim under Title VII's statutory language would require proof of (1) hiring, termination, compensation decisions, or other actions that affect the terms or conditions of employment or that limit a plaintiff's employment opportunities that are (2) taken because of (3) a protected trait. In some cases, no further explanation will be needed, and courts and litigants can focus on these key questions.[219] Indeed, this is the iteration courts use to explain how they approach direct evidence cases.[220]

Take again the hypothetical raised in Part II regarding the woman who faces harassment in the workplace, where employment policies are thoughtlessly crafted, and where the plaintiff may have been evaluated differently based on her gender. Whether this case gets to trial depends on how the court structures its inquiry.

Using a broad, statutory inquiry, a court would ask whether, looking at the facts as a whole, a reasonable jury could conclude that the plaintiff was discriminated against in the terms, conditions, or privileges of her employment based on her gender; or whether the employer limited its employees in any way that would deprive or tend to deprive them of employment opportunities or would otherwise adversely affect their status as employees, based on a protected trait. Note that this inquiry would consider both portions of Title VII's main operative provisions, rather than separately viewing 42 U.S.C. § 2000e-2(a)(1) as governing disparate treatment and § 2000e-2(a)(2) as governing disparate impact.

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218. Katz, *Disparate Treatment*, *supra* note 172, at 644.

219. Retaliation and accommodation cases may require a separate set of elements when they derive from different statutory provisions than pure discrimination claims.

220. *See, e.g.*, Delap v. Federal-Mogul Powertrain, Inc., No. 3:09-CV-73 CAN, 2010 WL 1541359, at *3 (N.D. Ind. Apr. 15, 2010).

In other cases, litigants or courts may need further guidance on how to legally define the elements of the discrimination claim in light of the particular facts of the case. For example, *McDonnell Douglas*'s core holding—that discrimination can be shown by establishing that the employer lied about the reason for its decision—could be an important supporting doctrine in some cases. By focusing on the essential elements of a claim first, however, the courts would not become mired in a pretext inquiry in cases where such an inquiry is not helpful.

Further, this proposed inquiry is similar to the inquiry courts undertake in many other contexts. Negligence cases are generally described through basic elements, as are many other statutory causes of action.[221] At times, the elements alone are enough to assist a court in resolving a case. At other times, supporting doctrines are used. But the negligence inquiry is not hijacked by the nuances of the supporting doctrine in every case.

To the extent that the frameworks are helpful in resolving a case, they can be placed within the general elements. For example, the idea that disparate impact allows causation through gross statistical disparities can be grafted onto Title VII's "because of" element as an explanation of one way to prove this element. Placing the gross statistical disparity analysis within the causation inquiry helps to better define why the requirement exists. Approaching the analysis in this way makes it more obvious that there may be other ways to establish causation when the plaintiff alleges nonintentional discrimination.[222]

Crafting general elements of a discrimination claim has many benefits. It reinforces the idea that many of the types of discrimination and their attendant frameworks are derived from the same statutory language. It allows courts to use simpler inquiries to resolve many cases. It acknowledges that there may be various ways to define a particular element, and it does so without necessarily tying these options to a particular type of discrimination. Reliance on elements emphasizes the actual statutory language[223] and places the language at a step in the analytical process where the language is given primacy over tests.[224]

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221. *In re* Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 359 (2d Cir. 2010) (discussing elements of statutory claim under the Securities Act); United States *ex rel.* SNAPP, Inc. v. Ford Motor Co., 532 F.3d 496, 504–05 (6th Cir. 2008) (discussing elements of claim under False Claims Act).

222. It is important to note that in the 1991 amendments to Title VII, Congress severely limited the ways in which plaintiffs can prove a disparate impact claim under Title VII. Title VII § 703(k), 42 U.S.C. § 2000e-2(k). This does not mean, however, that all nonintentional discrimination claims are subsumed under the heading of disparate impact.

223. This is not the same as making a textualist argument. Rather, whatever statutory interpretation methodology a court uses, the primacy of the language and its connection to any resulting decision should be given more importance than they currently are.

224. To adopt a single set of elements, the courts would need to read the 1991 amendments to Title VII as merely providing qualifying language to the statute's primary operative provisions. In other words, the statutorily provided mixed-motive and disparate impact frameworks would need to be read as falling within the umbrella of the statute's original text.

Abandoning or diminishing the current typology makes it easier to see that plaintiffs should be able to bring claims that fit within recognized categories of discrimination, but that do not fall neatly within any of the current rubrics. It is also more apparent that hybrid claims should be viable in some circumstances. For example, it may be easier for courts to recognize that structural discrimination claims are cognizable under the statutes or that plaintiffs should be able to proceed on intentional discrimination claims that do not fit neatly within the harassment or *McDonnell Douglas* frameworks.

Further, a return to first principles will allow courts to more fully examine whether the current structures actually carry out the mandate of the federal employment discrimination statutes. As described in Section IV.A, the current reliance on frameworks means that courts often engage the court-created test, rather than the statutory language.[225]

This proposal would also require courts to explore arguments that Title VII prohibits negligent discrimination, unconscious discrimination, and structural discrimination. This is not to state that the courts will actually recognize such claims, but rather that these claims arguably fit within the statutory language of Title VII—which does not explicitly require intent or that discriminatory treatment spring from individual action. Under the current approach, such claims are implicitly excluded from the statutes' coverage because none of the current frameworks allow a plaintiff to establish these types of discrimination. Whether negligent, unconscious, or structural discrimination claims are ultimately adopted, there is value in facially engaging whether the statutes prohibit such forms of discrimination.

Using the suggested approach does not mean that discrimination law no longer requires definition by appellate courts or that answering these questions will be easy. Important questions still remain to be answered, such as whether the "because of" language in the federal employment discrimination statutes would hold an employer liable for unconscious discrimination, whether the employer can be liable for negligent actions, and how strict the causal link is.[226] And the courts may still have to make choices regarding the elements themselves, such as whether accommodation or retaliation cases require different elements than discrimination cases. Focusing less on

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225. *See supra* Section IV.A; *see also* Diaz v. Jiten Hotel Mgmt., Inc., Civ. A 08CV10143-NG, 2011 WL 181777, at *11 (D. Mass. Jan. 20, 2011) (expressing concerns that the frameworks and supporting doctrines do not fully capture complex discrimination inquiries). Of course, abandoning or diminishing the use of frameworks will not prevent courts from dismissing cases that are arguably cognizable, as courts can use other types of arguments to reach similar conclusions. However, the approach advanced in this Article will make simple cases easier, make some judges aware that the formalistic use of frameworks may cause the unintentional dismissal of cognizable claims, and encourage courts to explicitly address questions regarding the contours of discrimination law.

226. *See generally* Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1 (1998) (discussing the Supreme Court's various approaches to causation analysis in Title VII cases).

frameworks will allow courts to concentrate more on these important questions.[227]

B. *Questioning the Necessity of the Frameworks*

Underlying the intuitive appeal of the current typology is the idea that the typology was necessary to help lower courts decide employment discrimination cases. A corollary to this idea is that without frameworks, the lower courts will have great difficulty deciding discrimination cases. These concerns are misplaced. The history of frameworks casts doubt on whether they were even necessary in the first place. Further, there is nothing especially complex about employment discrimination law that suggests it should work differently than other kinds of cases.

Much like reports of Mark Twain's death, the need for the frameworks has been greatly exaggerated. In many cases, the Supreme Court has assumed that lower courts are confused about employment discrimination law and then resolved the nonexistent confusion by mandating that lower courts think about discrimination problems through frameworks. The *McDonnell Douglas* burden-shifting test, the severe or pervasive test in harassment cases, and parts of the disparate impact structure were all created before there was a demonstrated need for them.

McDonnell Douglas offers a classic example of how appellate courts resolve nonexistent problems. The three-part framework is complicated in both its substance and in its odd burden-shifting procedures. One might think that a terrible confusion must have existed in the lower courts to justify the imposition of such a complex framework. But the district court in *McDonnell Douglas* had no problems analyzing the case before it, which involved an individual who alleged that his former employer refused to rehire him because of his race and his participation in civil rights protests.[228] The employer claimed that it would not rehire the plaintiff because his protests, which included stalling cars on a public road outside the defendant's business to prevent egress, were illegal. The trial court sensibly explained one of the key factual inquiries as "whether the 'stall in' and the 'lock in' are the real reasons for defendant's refusal to rehire the plaintiff."[229] The district court was able to make this determination without a complicated framework.

The Eighth Circuit Court of Appeals tried to impose a complex framework that cast doubt on the validity of subjective decisionmaking.[230] The Supreme Court responded to the Eighth Circuit by tinkering with its complicated framework rather than recognizing that perhaps there was no need

227. Even if courts choose not to abandon the frameworks, there is still value in having them think more deeply about the role of frameworks. In some instances, the frameworks are nonfunctional or, at worst, dysfunctional.

228. Green v. McDonnell-Douglas Corp., 318 F. Supp. 846 (E.D. Mo. 1970), *modified*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973).

229. *Id.* at 850.

230. Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972).

for the framework at all. Even if the Supreme Court thought the district court was confused about the role of pretext in employment discrimination cases, the creation of the multipart framework was not justified. The Court simply could have held that evidence that the employer's reason for an action is pretextual may be evidence of discriminatory motive. Instead, it chose to create a multipart framework.

In *Watson v. Fort Worth Bank and Trust*, the Court was asked to determine whether disparate impact analysis could apply to subjective employment practices.[231] Holding that it did, the Court then anticipated that its "extension of that theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment."[232] The Court felt compelled to resolve the anticipated problem by clarifying the disparate impact framework. The Fifth Circuit Court of Appeals had held that subjective decisionmaking could not be challenged through disparate impact analysis,[233] and the Supreme Court could have responded to the Fifth Circuit's holding by indicating that disparate impact analysis is appropriate for subjective decisionmaking. It was not essential for the Supreme Court to address proof structure issues.

Similarly, the Supreme Court engaged in problem anticipation in the harassment context. In *Meritor Savings Bank v. Vinson*, the Court addressed whether harassment claims were actionable under Title VII if they did not result in tangible, economic harm.[234] The Court indicated that harassment would be actionable if it affected a term, condition, or privilege of employment.[235] The Court could have ended its analysis there; however, it then began to articulate a framework in which harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.' "[236] Likewise, in *Harris v. Forklift Systems, Inc.*, the Court could have limited its holding to whether the plaintiff had to suffer psychological harm to state a claim for sexual harassment.[237] A broader, but still limited, holding could have addressed this issue as well as the question of whether an objective standard would be used.[238] Rather than limiting itself to these primary

231. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

232. *Id.* at 993.

233. Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 797 (5th Cir. 1986), *vacated*, 487 U.S. 977 (1988). The appellate court analyzed the individual plaintiff's claim as a disparate treatment claim. *Id.* at 797–98.

234. 477 U.S. 57, 64 (1986).

235. *Meritor*, 477 U.S. at 66.

236. *Id.* at 67 (alteration in original) (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

237. 510 U.S. 17, 20 (1993).

238. *Harris*, 510 U.S. at 21–22. In *Harris*, the petitioner's brief suggested criteria for determining whether an individual's environment was hostile. This was not the main issue raised in the case, however. Brief for Petitioner, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 302216, at *41. Nor was there any evidence that the lower courts in the case had trouble with such an inquiry. The magistrate judge engaged in a

questions, the Court articulated several factors that a court should consider when thinking about how serious harassment is.[239]

It could be argued that the Supreme Court should resolve anticipated problems to head off subsequent confusion among the lower courts. However, the Supreme Court has often assumed such confusion where none existed. Even assuming that some confusion would be generated by a lack of guidance, the Supreme Court's frameworks have generated quite a few problems on their own. Since 1971, the Supreme Court has repeatedly readdressed how its frameworks operate.[240] The federal appellate and district courts are endlessly engaged in framework questions.[241] It took decades for the Court to explain the nuances of the *McDonnell Douglas* test.[242] Congress felt compelled to rework the frameworks that the Court created for mixed-motive and disparate impact cases.[243]

Even if one believes that the frameworks were originally necessary, however, this does not mean that they still are. In the early 1970s, it may have been important for the courts to think about the ways discrimination might happen and to give those ways names and frameworks. To the extent that the formulations now have decreasing utility, their continued use becomes less compelling.

To impose so many frameworks is not only unusual, but also gives the mistaken impression that employment discrimination cases are somehow different or harder than other cases that judges handle. Indeed, the sheer number of frameworks in employment discrimination law makes it rather unique among statutory regimes. But the assumption that the frameworks are needed is also belied by the fact that at least some of the frameworks are

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broad-ranging inquiry regarding the work environment. Harris v. Forklift Sys., Inc., No. 3-89-0557, 1991 WL 487444, at *5–8 (M.D. Tenn. Feb. 4, 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd*, 510 U.S. 17 (1993). Further, there was no explanation in *Harris* why the court chose to focus on the four factors that it did. The EEOC had identified more relevant factors in describing whether conduct created a hostile environment, and the magistrate judge focused on numerous factors. *See* Brief for Petitioner, *supra*, at *41 (describing EEOC factors); *Harris*, 1991 WL 487444, at *5–8.

239. *Harris*, 501 U.S. at 23.

240. *See, e.g.*, Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 91–95 (2008); Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–101 (2003); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–13 (1996); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

241. *See, e.g.*, Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217, 234 (2007) (describing the circuit split that developed regarding how disparate impact claims would work in the ADEA context); Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 506, 527 (2008) (describing how circuit splits erupted over the interpretation of *McDonnell Douglas*).

242. *See, e.g.*, *Consol. Coin Caterers Corp.*, 517 U.S. at 311–13; *Hicks*, 509 U.S. at 506–07; *Burdine*, 450 U.S. at 253.

243. *See Desert Palace*, 539 U.S. at 94–95 (explaining the 1991 amendments to Title VII for mixed motive under 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B)); Phillips v. Cohen, 400 F.3d 388, 397–98 (6th Cir. 2005) (discussing how the 1991 amendments affected disparate impact analysis under Title VII).

abandoned at trial. When cases go to the jury, many of these complicated framework issues are absent from jury instructions.[244]

In other fields, rigid rules are relaxed over time in favor of standards. In the same vein, the rigid formality of the discrimination frameworks should be relaxed.[245] Indeed, the Supreme Court may have signaled a retreat from its prior reliance on the types and frameworks. In *Gross*, the Supreme Court refused to recognize a mixed-motive claim under the ADEA.[246] While this holding is problematic in several respects, the reasoning of the case suggests that the Court was reluctant to continue down the path of creating a new proof structure or modifying existing ones.[247] In refusing to apply the *Price Waterhouse* test to the ADEA, Justice Thomas noted that "[w]hatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply."[248] He continued, "[E]ven if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."[249] *Gross*, despite its otherwise faulty analysis, may have one saving grace: it signals the Supreme Court's retreat from frameworks.

C. *Addressing Concerns Regarding Political Will, Consistency, Certainty, and Efficiency*

Abolishing or significantly reducing the reach of the typology potentially raises concerns about political will, consistency, certainty, and efficiency. Each of these is an important value, and each must be considered and addressed.

The problems created by the typology could be viewed as the necessary consequences of a lack of political will. After all, if Congress did not approve of the types and frameworks, it has the power to amend the federal statutes. If Congress chooses not to amend the typology, it might be assumed that it implicitly approves of them. This is an important critique, but it ignores that the effects of the frameworks are not readily transparent. It is difficult for courts and litigants, let alone Congress, to understand the typology's side effects, such as underexplored discrimination theories and tests that are sometimes mismatched to the way in which discrimination occurs. This is especially true when many frameworks purport to allow more

244. *E.g.*, Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990) (indicating *McDonnell Douglas* framework is too complex for jury instructions).

245. This discussion is not part of the rule versus standards debate because the discrimination frameworks tend to be standards. However, this discussion is informed by that debate to the extent that the type/framework model has rule-like tendencies. For further discussion of how rules and standards change over time, see, for example, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 429 (1985).

246. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351 (2009).

247. *See id.* at 2349.

248. *Id.* at 2352.

249. *Id.*; *see also* Katz, Gross *Disunity*, *supra* note 2, at 878.

nuanced decisionmaking than the courts actually engage in.[250] Indeed, one key reason for abandoning the typology is to make the courts' reasoning and its impact more visible.[251]

A more valid critique is that Congress has embraced the frameworks with their 1991 amendments to Title VII, including the codification of a disparate impact framework.[252] It is correct that Congress inserted a three-part disparate impact framework into Title VII in response to the Supreme Court's decision in *Wards Cove*. But this decision does not translate into widespread congressional acceptance of the typology.[253] While it may have been clear to Congress that the specific *Wards Cove* framework was flawed and required attention, Congress did not engage in a searching disparate impact inquiry when it amended Title VII.[254] Rather, an anchoring effect drove the process, in which the outcome was dictated by the starting position—the test enunciated by the Supreme Court.

Even assuming that the 1991 amendments demonstrate congressional approval of a three-part framework for disparate impact cases, this does not support the broader argument that Congress approves of the current typology. First, the 1991 amendments do not cut off further judicial inquiry into ways in which substantive equality can be incorporated into Title VII or provide the only method of proceeding when the plaintiff lacks evidence of intent.[255] Second, if one were to argue that the Title VII amendments evinced broad support for the typology in the disparate impact context, it would at least remains ambiguous what Congress intended for the ADEA and ADA, which Congress did not amend.

More importantly, the 1991 amendments did not embrace a framework mentality regarding disparate treatment. By adding language to make it clear that so-called "mixed-motive" claims were cognizable, Congress did not use the term "mixed motive" or enshrine a multifactor test into the statute. Ra-

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250. *See, e.g.*, O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–12 (1996) (noting lower courts refused to make common sense changes to *McDonnell Douglas*'s prima facie case, despite knowing that test required adjustments to fit factual circumstances).

251. In *Gross*, the Supreme Court engaged in a non-test-based analysis of the ADEA, holding that the ADEA's language required a plaintiff to establish but-for causation. 129 S. Ct. 2343. While *Gross* is rightfully criticized for many reasons, it at least provides a clear target for congressional reaction. *See* Katz, Gross *Disunity*, *supra* note 2, at 880–84. In response to *Gross*, legislators have proposed the Protecting Workers Against Discrimination Act, which would clarify that the ADEA allows plaintiffs to proceed by establishing that age was a motivating factor in an employment decision. *See* Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. § 2(a)–(b) (2009).

252. *See* Pub. L. No. 102-166, sec. 105(a), § 703, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k) (2006)).

253. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (indicating that the disparate impact amendments were a response to *Wards Cove*); H.R. REP. No. 102-40, pt. 1, at 17, 23–45 (1991), *reprinted in* 1991 U.S.C.C.A.N. 555, 561–83 (indicating that congressional action was taken in response to proof structures).

254. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071; H.R. REP. 102-40, pt. 1, at 17, 23–45 (1991), *reprinted in* 1991 U.S.C.C.A.N. 555, 561–83.

255. Title VII § 703(k), 42 U.S.C. § 2000e-2(k) (2006).

ther, Congress chose to broadly define the causation standard and then identify an affirmative defense.[256] Likewise, when Congress amended Title VII's remedies provision in 1991, it did not indicate that there were only two types of discrimination claims (disparate impact and disparate treatment). Rather, it provided only that certain kinds of damages would be allowed if the plaintiff proved intent. This is not the same as dividing employment discrimination cases into two types (intentional and disparate impact).

Consistency and certainty are also valid concerns. In a sense, the frameworks do cabin judicial discretion and arguably create a kind of factual uniformity regarding what constitutes discrimination. Likewise, the typology provides employers with some notion regarding when liability will attach.

The numerous sources of confusion regarding framework technicalities reduce the consistency that the frameworks offer.[257] Even without the circuit splits, though, the supposed consistency promised by frameworks comes at the costs discussed throughout this Article. To the extent that some of the frameworks actually direct courts away from asking whether a person was treated differently because of a protected trait, a consistency argument is less compelling. Just because a test is consistent does not mean that it is consistently producing proper results.

The consistency and certainty arguments are more compelling regarding court-identified types of discrimination. At some level, they do provide a concrete way for courts to conceptualize discrimination. The benefits of labeling are not in dispute. What is disputed are the assumptions that accompany those labels regarding the completeness and separateness of the frameworks.

Finally, it is necessary to discuss efficiency concerns. In individual disparate treatment law, where the interactions of the various frameworks are complex, it is not clear that the frameworks meaningfully aid the courts in resolving discrimination claims. Indeed, abolishing the *McDonnell Douglas*

256. *Id.* § 703(m), 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."); *id.* § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (explaining the remedies that would available if employer established affirmative defense).

257. *See supra* Section I.A (describing Supreme Court resolution of numerous issues); Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008); Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–101 (2003); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–13 (1996); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Noviello v. City of Boston, 398 F.3d 76, 89 (1st Cir. 2005) (noting circuit split regarding whether a hostile environment can comprise a retaliatory adverse action); Seitz v. Lane Furniture Indus., Inc., No. 07CV171, 2008 WL 4346439, at *11 (N.D. Ohio Sept. 17, 2008) (noting a circuit split regarding whether motivating factor cases can proceed under ADA); Raffaele v. City of New York, No. 00-CV-3837 (DGT)(RLM), 2004 WL 1969869, at *19 n.27 (E.D.N.Y. Sept. 7, 2004) (indicating that there is a circuit split regarding what constitutes an adverse employment action); Gaston v. Restaurant Co., 260 F. Supp. 2d 742, 752 (N.D. Iowa 2003) (noting a circuit split regarding whether reverse discrimination plaintiffs are required to show additional evidence).

test while preserving only its core holding will likely make it easier for courts to determine whether a claim should survive summary judgment.[258] Clarifying that mixed-motive and single-motive cases do not require separate proof structures will also reduce many questions that now plague courts.

Further, this Article's solution does not contemplate open-ended chaos in employment discrimination law. Indeed, the majority of cases will still likely fall within the currently delineated types, even if the negative effects of a framework model are avoided by giving the typology less sway. It is contemplated that over time, new ideas about discrimination will be explored. Not every factual allegation of discrimination will comport with these new arguments, not all of the new arguments will be accepted, and the changes in the field are likely to happen incrementally over time.

Outside of traditional disparate treatment cases, courts will be required to rigorously consider new arguments about discrimination, which is less efficient from a court-resources standpoint than implicitly rejecting new arguments because they do not fall within the current frameworks. But it is important not to overstate the efficiency problem by making sweeping generalizations about the floodgates of litigation. As discussed earlier, there are only certain sets of facts from which a discrimination claim can plausibly be made. Further, the mandatory administrative process and the short limitations period already cabin employment discrimination claims.[259] This Article posits that any losses in court efficiency are worth the benefits derived from more explicit consideration of the employment discrimination statutes.

CONCLUSION

In some ways, the framework model is comforting because it gives the appearance that the courts are following an orderly and rational way of making decisions about employment discrimination. Unfortunately, employment discrimination law is held captive by this increasingly complicated web of frameworks, which facilitate a reflexive, formalistic view of discrimination. Rather than asking whether a particular set of facts establishes discrimination under the statutory scheme, courts and litigants now ask whether the facts fit within a court-defined structure. Judges considering discrimination claims use narrow frameworks through which to view the discrimination inquiry. If a case does not fit comfortably within a recognized structure, it likely will be dismissed.

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258. It is also necessary to address critiques centered in legal realism or from critical legal studies that judges will simply retool the law in line with their own personal or class preferences, whether intentionally or unintentionally. While this may be true in certain instances, the critique applies to almost any attempt at statutory interpretation or construction.

259. Title VII § 706(e)(1), 42 U.S.C. § 2000e-5(e)(1) (indicating that a charge of discrimination must be filed within 180 or 300 days of discriminatory act in Title VII case); *id.* § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (noting that suit must be filed within ninety days of obtaining right to sue letter).

The frameworks presume that appellate judges both know how discrimination manifests itself in the workplace and can summarize those manifestations into multipart tests. Such an assumption vastly underestimates the complexity of discrimination, which stems from a variety of motivations and presents itself in countless ways.[260] Over time, the dominant forms of discrimination have changed from overtly discriminatory policies to more subtle forms of discrimination. The inflexibility of the framework model makes it unable to account for the full manifestations of discrimination and stunts the evolution of discrimination law.

The Article has considered the ways in which the framework model distorts discrimination law and suggests ways to eliminate or diminish that distortion. In the 1970s, Professor Charles Lawrence argued that much discrimination is unintentional.[261] It is now time to question whether its structural contours are as well.

260. *See* Samuel R. Bagenstos, General Essay, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477 (2007) (discussing various reasons people may have negative race-based perceptions that do not relate to personal prejudice).

261. Lawrence, *supra* note 80, at 322.